

CERTAIN INTERNATIONAL LEGAL PROBLEMS RELATING TO  
EXERCISE OF ECONOMIC SELF-DETERMINATION  
BY AFRICAN STATES

BY

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AFFIRMATION OF AUTHORSHIP

University of Edinburgh Resolution 2.4.15.

I declare that this Thesis has been composed by myself, that it is my original work, and that any errors of omission or commission are entirely my own.

Stephen Tariro Kokerai



## ABSTRACT OF THESIS

The primary concern of this thesis is to examine how African States have been and are exercising their economic self-determination in accordance with international law. Political independence in itself does not entail economic sovereignty. The development of the principle of economic sovereignty particularly in relation to the African States, is discussed and its legal scope determined.

Exploitation of natural resources is an essential element of economic sovereignty. The legal regimes regulating these resources at the time of the independence of the African States form a threshold for the right of economic self-determination. In the exercise of this right, various stages and forms are notable. At first, the African States took measures securing adjustment of existing legal constraints in the regimes that they had inherited. This was followed by their attempt in formulating new legal machinery giving them greater freedom to exploit their natural resources to fuller advantage. Recognising a need for joint efforts, the African States have established various fora for international economic co-operation.

The Thesis actually examines the salient legal problems relating to the utilisation of natural resources; economic use of African international river basins; and looks into various legal forms employed to regulate international economic co-operation. Questions of settlement of territorial controversies; and international economic disputes are also discussed.

The study concludes that the exercise of economic self-determination by African States is based, inter alia, on the recognised principles of international law, namely, equal rights and self-determination of peoples and nations; sovereign equality of states; permanent state sovereignty over its natural resources; international co-operation for development; mutual and equitable benefit; fulfilment of international obligations in good faith; and peaceful settlement of international economic disputes.

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v.

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LIST OF ABBREVIATIONS

ABEDA	Arab Bank for Economic Development in Africa
ACP	African, Carribean and Pacific
ADB	African Development Bank
AJIL	Americal Journal of International Law
AMAMCO	Mauritania - Morocco Co-operation Agency
BFSP	British and Foreign State Papers
BYIL	British Yearbook of International Law
CEIM	Centre for Industrial Studies of the Maghreb
CMAR	Committee on Insurance and Re-insurance
CMCPT	Committee on the Co-ordination of Postal and Tele-communications Services
CMET	Maghreb Committee on Employment and Labour
Cmnd	Comman Papers (United Kingdom)
CMPP	Committee on Tourism
CMTA	Maghreb Committee on Air Transport
CMTM	Committee on Sea Transport
CMTR	Committee on Road Transport
CPCM	Maghreb Permanent Consultative Committee
COMANOR	Committee on Standardisation
COMASTAT	Committee on National Accounts and Statistics
COMELEC	Committee on Electric Energy
CTFM	Committee on Rail Transport
EAC	East African Community

EADB	East African Development Bank
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EEC	European Economic Community
EIB	European Investment Bank
FNLA	Front for the National Liberation of Angola
FRELIMO	Front for the Liberation of Mozambique
GATT	General Agreement on Tariffs and Trade
GECOMINES	Generale Congolaise des Mines
GEPGL	Economic Community of the Great Lakes Countries
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICLQ	International Centre for Settlement of Investment Disputes
IJIL	Indian Journal of International Law
ILA	International Law Association
ILM	International Legal Materials
IMCO	Inter-governmental Maritime Consultative Organisation
LNTS	League of Nations Treaty Series
MFN	Most-Favoured-Nation
MPLA	Movimento Popular De Libertacao de Angola
NIEO	New International Economic Order
NY	New York
OAU	Organisation for African Unity
OERS	Organisation of the Senegal River States

OMVS	Organisation for the Development of the Senegal River
PCIJ	Permanent Court of International Justice
RIAA	Report of the International Arbitral Awards
SGM	Societe Generale de Minerais
SORAD	Statutes of the Regional Land Use Planning and Development Companies
UDEAC	Central African Economic and Customs Union
UEAC	Union of Central African States
UK	United Kingdom
UKTS	United Kingdom Treaty Series
UMAO	West African Monetary Union
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNFAO	United Nations Food and Agricultural Organisation
UNITA	National Union for the Total Independence of Angola
UNNY	United Nations, New York
UNTS	United Nations Treaty Series
USA	United States of America
USSR	Union of Soviet Socialist Republics



INTRODUCTION

This thesis examines the right of economic self-determination in relation to its exercise by African States; traces the development of this principle at national and regional levels; discusses the obstacles that African States face at the time of their political independence; and gives an account of different forms of the exercise of this right in the chosen areas.

International Law as developed through the United Nations recognises the right of every people or nation to develop. The right to develop is an essential element of and is based upon the right to economic self-determination. Provisions which directly or indirectly concern the principle of economic self-determination are contained in both the U.N. and O.A.U. Charters. Economic self-determination as developed through the United Nations of which the Charter of Rights and Duties of States is an example, is understood to mean that every State has a sovereign right to choose its economic system in accordance with the will of its people, and freely exercise full permanent sovereignty over its natural resources, including their possession, use and disposal; the control of all its wealth, and all economic activities relating to the exercise of that right.

The right to self-determination includes two main aspects - one political and the other economic. Political self-determination does not automatically lead to the achievement of economic independence. Economic independence is normally attained after

achievement of political self-determination. Economic self-determination requires diverse methods and takes varied legal forms.

Self-determination has developed and continues to develop through the United Nations and individual State practice. While the United Nations Law provides the principles and norms, the individual or regional State practice gives substance to those principles. The contribution of African States to this development includes taking actions which adjust the legal obligations, the encumbrance of the colonial period, that constraint the exercise of economic self-determination. They also formulate positive new constitutional provisions and establish regional economic co-operation organisations. They seek to bring about the adjustment of existing obligations, the establishment of new regimes which enable them to exercise economic self-determination, the establishment of a kind of economic collective security, and the promotion of the New International Economic Order (NIEO).

Chapter One of this study deals with the development of self-determination in relation to its exercise by African States and concludes that the link between political and economic independence does not automatically lead to the achievement of the latter after the attainment of the former.

In Chapter Two, economic sovereignty and utilisation of natural resources is discussed, and major legal instruments of exercising economic sovereignty are examined. Discussions here show that the principle



of sovereignty is the corner-stone on which African States base their rights to legislate in relation to utilisation of natural resources.

Chapter Three discusses the various legal forms employed to regulate economic co-operation; bilateral; sub-regional; regional and inter-regional regulation. Sub-regional economic regulation is the basic form upon which African States promote exercise of their economic self-determination.

In the examination of legal and institutional aspects of economic utilisation of African international river basins in Chapter Four, the existence of an inadequacy in both African international river law and African international institutions employed to regulate utilisation of these resources is pointed out. It is also pointed out that this inadequacy is due to the relatively recent development of the laws in this area, as well as that of the institutions.

Section one of Chapter Five is designed to show the international legal regime that governs the settlement of territorial controversies in their relationship to exercise of economic sovereignty, while Section two discusses particular territorial and boundary disputes, with the aim of illustrating their connection with the question of economic self-determination.

Chapter Six of the thesis on the peaceful settlement of economic disputes in African States surveys the international legal instruments and institutions employed as a means of settlement of such disputes.

## CHAPTER 1

# LEGAL SIGNIFICANCE OF SELF-DETERMINATION OF AFRICAN PEOPLES AND NATIONS

## INTRODUCTION

In this chapter, I examine the legal ascertainment of the principle of self-determination with a view to showing how self-determination has been exercised by African peoples and nations. The primary concern is to show its development in relation to the question of attainment of political independence by African peoples and nations, beginning with the era of the League of Nations.

I discuss this subject matter beginning with the era of the League of Nations, because the Treaties of Peace of 1919-1923,<sup>1</sup> and the Covenant of the League of Nations marked the beginning in the transformation of the international legal order from an order based on jus ad bellum, to that based on the promotion of international peace and security, and the ascertainment of the principle of self-determination of peoples and nations. Before the Covenant came into force, there were no substantial international legal instruments which provided for the regulation of the question of maintenance of international peace and security at a multilateral global level. Although the Covenant did not in general expressly stipulate provisions for self-determination, Article 22 laid down the

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1. See Lawrence Martin, The Treaties of Peace 1919-1923, Volumes I-II, (N.Y. 1924); J.A.S. Grenville, The Major International Treaties 1914-1973: A history and guide with text, (London, 1974); G. Schwarzenberger, The League of Nations and World Order: A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations, (London, 1936); M. Whiteman, Digest of International Law, Volumes I-V, (Washington, 1965). The Covenant was also published separately by Information Section, League of Nations Secretariat, in the form of a Pamphlet: The Covenant of the League of Nations, (Geneva, 1924).



foundation upon which self-determination was evolved through the League of Nations Mandate System.<sup>2</sup> This article does specifically mention the Mandate System. It does thus provide for self-determination albeit in a limited way. And to a certain degree this marks the beginning of the legal ascertainment of self-determination. It is by discussing the League's Mandate System that a link between the legal development<sup>3</sup> of the principle of self-determination in general and, its application to African peoples and nations in particular, can be established.

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2. See Ibid., The Treaties of Peace 1919-1923, Vol. I: Covenant of the League of Nations, Article 22.
  3. On the historical development of self-determination see: A. Cobban, The Nation State and National Self-determination (London 1960); A. Rigo Sureda, The Evolution of the Right of Self-determination: A study of the United Nations Practice, (Leiden 1973); Umozurike O. Umozurike, Self-determination in International Law, (London 1972); R. Emmerson, From Empire to Nation: The Rise of Self-assertion of Asian and African Peoples, (Cambridge 1960); R. Emmerson, Self-determination Revisited in the Era of Decolonization, (Boston 1969); Marjorie M. Whiteman, Digest of International Law, Volume V, (Washington 1965); Sarah Wambaugh, Plebiscites since the World War: with a Collection of Official Documents, Volumes I and II, (Washington 1933); Sarah Wambaugh, A Monograph on Plebiscites: with a Collection of Official Documents, (N.Y., London, Oxford Toronto, etc., 1933).



## Section A. Historical Background

### 1. Historical Legal development of the Principles of Self-determination

Self-determination originated in the era of industrial revolutions (18th Century) in Western Europe<sup>4</sup> and North America. Initially, the idea was formulated as the principle of nationality. The French and American revolutions may be regarded as its first manifestations.<sup>5</sup>

The principle of nationality was reflected in the French Constitution of 1789. In that constitution the principle was based on the idea that the nation is sovereign and that all its members are free and have equal rights. Preceding the French Constitution was a "Declaration of the rights of man and of the citizen (August 26 1789)".<sup>6</sup>

4. The formation of a nation is inextricably linked with nationalist movements. In Europe these nationalist movements arose at the end of the Mediaeval period and also at the beginning of the age of European industrial revolutions. The final goal of all nationalist movements in the later era was the creation of national states. In the words of V.I. Lenin, "The formation of national States is the tendency of every nationalist movement", see V.I. Lenin in Polnoe Sobranie Sochinenni, Volume 25, p. 258. Of all the historical formations, capitalism with its urge to destroy all partitions within a country, whatever their nature, with its urge towards the creation of a National common market, was the force which completed the formation of the major European nations. The Feudal Society which had based its rule on the principle of legitimism, that had provided for the absolute power of the Feudal Kings, had not taken heed of the "consent of the governed". This is why, at that time, the alternative "legal norm", the principle of nationality, gained popularity over the idea of absolute rule of the Feudal Kings.
5. See A New Survey of Universal Knowledge: Encyclopaedia Britannica, Volume 16, (London, 1966), on Nationalism and Nationality, pp. 63-66.
6. See Jean Brissaud, A History of French Public Law: The Constitutional Legal History Series, Published under the Auspices of the Association of American Law Schools, (London, 1915), pp. 535-557.

It stipulates in more precise terms that "men are born and remain free and equal in rights. Social distinctions can be based only upon public utility".<sup>7</sup> The declaration further provides in point 3, that the source of all sovereignty is essentially in the nation; no body, no individual can exercise authority that does not proceed from it in plain terms.

In its international legal context, and as connoting self-determination, the principle of nationality meant the right of a group of individual human beings to form into a nation. A nation is understood to be a body of people marked off by common descent, language, culture and sharing a common territory. Under Article 15 of the United Nations Universal Declaration of Human Rights, "everyone has the right to nationality", and "no one shall be arbitrarily deprived of his nationality ..."<sup>8</sup> While it is true that the Universal Declaration of Human Rights refers to "nationality" as a legal relationship between the individual and the State, it is equally correct to interpret (the "principle of nationality" within the context of the said Declaration, especially when referring to the question of formation of "nation States") as meaning the right of every individual human being to participate in determining the exercise of the right of self-determination by peoples and nations. Furthermore, the Declaration provides in Article 2 paragraph 2 that in applying the rights and freedoms proclaimed therein - no distinction shall be made on the basis

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7. See Ibid, p. 543.

8. See United Nations General Assembly Resolution 217(III)  
"Universal Declaration on Human Rights" of 10  
 December 1948.



of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

In the context of the 1789 French Constitution the principle of nationality was deemed to mean that:-

Government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organise themselves as they wish. This meant that the territorial element in a political unit lost its feudal predominance in favour of the personal element; people were not to be any more a mere appurtenance of the land.<sup>9</sup>

It is clear that the principle of nationality confers upon the French people their right as a nation, to respect the rights of every individual member of the community. The principle also expressly provides for the nation's sovereign right to decide upon its own affairs.

The principle of nationality was also reflected in the Constitution of the United States of America of 1787.<sup>10</sup> Like that of the French, the U.S.A. constitution expresses the right of the individual to the U.S.A. nationality but unlike the French, the 1787 U.S.A. Constitution was discriminatory. It did not extend the nationality rights to the American Indians. These Indians were simply regarded as non-citizen nationals.

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9. A. Rigo Sureda, The Evolution of the right of self-determination: A study of the United Nations practice, loc.cit.above.

10. United States Code Annotated: Constitution of the United States Annotated, Articles 1, para. 1 to Article 1, para. 8, cl.3, Annotated from Federal and State Courts, (St. Paul, Minn. West Publishing Co., 1968).

This means that under the U.S.A. constitution the American Indians did not have the same rights as those conferred upon Americans of European extraction.

Though this inhibition of constitutional rights to American Indians denies the exercise of the principle of nationality, the basic idea in itself remains intact, and it was embodied in the American Declaration of Independence (July 4, 1776).<sup>11</sup>

Within the context of the French and the American constitutions discussed above, the principle of nationality provided for the establishment of democratic national governments, based on "the consent of the governed", and while this principle insisted on the nation's sovereign right to decide its own future, it condemns all forms of interference by another nation or state, into the internal and external affairs of the other. While the French revolutionaries were at first consistent in upholding their ideals, and renounced all wars of conquest, they soon deviated from their professed principle. They agreed to the annexation of territory to France albeit, only after a plebiscite.<sup>12</sup>

A further historic development of the principle of nationality occurs during the French revolution of 1848; and by the 1860's it was already interpreted in the doctrine of international law as meaning the nation's right to self-determination.

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11. See Ibid., p.1; Edward Dumbauld, "Independence Under International Law", in American Journal of International Law, Vol. 70, (1976), pp. 425-431.

12. This was in the case of Savoie, Nice and Mayence, see S. Wambaugh, A Monograph on Plebiscites, op.cit.



At that time

the conception of individual self-determination as a corollary of democracy (the proposition that "Ruritarians have a right to choose to what state they shall belong") (shifted) to the conception of nationality as an objective right of nations to independent statehood (the proposition that "the Ruritanian nation has a right to constitute itself an independent state"). The rights of man envisaged by the French revolution were transferred to nations.<sup>13</sup>

As a result of this transformation of the principle of nationality, some European nationalists movements in 1848 strived to form new states on the bases of national characteristics; hence the formation of the states of Germany and Italy. In order to ensure that the population of the particular nationality were fully consulted in a democratic manner, plebiscites were used. Plebiscites were used to decide the unification of the German peoples. By the 1880's the use of plebiscites to settle territorial disputes had become State practice.

Illustrating the use of plebiscites during that time, S. Wambaugh writes the following:-

The method of popular consultations adopted as their own by Prussia and the Germanic

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13. See Sureda, op. cit., p.18, citing E.H. Carr, The Bolshevik Revolution (1917-1923) Vol. 1, (1969), p. 417 n.1; R.J. Erickson, International Law and the Revolutionary State: A Case study of the Soviet Union and Customary International Law, (N.Y. 1972).

Confederation as the solution for the Schleswig question; adopted by the Congress of Paris of 1856, it grew rapidly in prestige and by 1859 had enlisted the almost undeviating adherence of three of the four leading statesmen of the time - Cavour, Russell and Napoleon - and the temporary support of Bismark .....; endorsed, though unsuccessfully, by the chief Powers at the Conference of London as the only solution for the Schleswig question; followed by Great Britain in her cession of the Ionian Islands to Greece; inserted in the treaty of Prague between Austria and Prussia - by 1886 the method of appeal to a vote of the inhabitants, either by plebiscite or by representative assemblies, especially elected, bode fair to establish itself as a custom amounting to law.<sup>14</sup>

During the latter quarter of the 19th Century the principle of nationality was gradually being transformed into the principle of self-determination. But the process was from time to time impeded by certain powers that did not adhere to it. For example, the process was halted by Prussia when it annexed by force Hesse and Hanover (1866), Schleswig (1867) and Alsace-Lorraine (1871). Another limitation of the principle of nationality was that self-government was only applicable to Europe. Colonial, "uncivilised" peoples e.g. Africa, were simply treated as exceptions outwith that principle, and from international law in general. This is confirmed by the fact that colonisation of most African countries by the European nations took place during the latter quarter of the 19th Century.

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<sup>14</sup>. See Sureda, op.cit., p.19, citing S. Wambaugh, A Monograph on Plebiscites, (1920) p.10.



Since at that time the European peoples had accepted the exercise of the principle of nationality by themselves "the civilised and christian nations", colonisation of Africa may not be deemed to have been a desire to "furthering" of "the moral and material well-being of the native populations",<sup>15</sup> as prescribed by paragraph (3) of the Act of the Berlin Treaty of 1885. Article 6 of the Berlin Treaty makes it apparent that the European colonial powers exercised sovereign rights and influence in the colonised territories. The treaty which was the most elaborate legal arrangement on the colonisation of Africa, became the chief legal instrument for the deprivation of sovereignty of African peoples and nations and their subjugation to foreign rule. This position by the European international community towards the African nations, was maintained right through the Peace Treaties of 1919-1923, up to 1945, when the Charter of the United Nations came into force. As a consequence of non-adherence to the principle of nationality at the international level, except in certain minor cases<sup>16</sup> relating to self-determination in Europe, the principle of self-determination did not come to the fore again until at the end of the First World War.

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15. See Umozurike, op. cit., p.28, citing 106 BFSP (1913), p.1023; M. Barkum, Law without sanctions, order in primitive societies and the world community, (New Haven, 1968).

16. These were cases when after 1870 only two plebiscites were held in Europe; one in the island of Saint Bartholomew in 1877 between Sweden and France, and the other in Norway in 1905 regarding separation from Sweden.

Since World War I was a war between empires:

.... self determination became a factor of great strategic value. The Central Powers were the first to realise it and the Germans thought that, since the British Empire was more heterogeneous than the German, a ruthless application of the principle of self-determination would produce a far more scattering explosion in the British territories than it would do in theirs.<sup>17</sup>

But such "ruthless" application of self-determination was skillfully avoided by the Principal Allied and Associated Powers which included the United Kingdom. After the defeat of Germany and her allies, self-determination was only to be applied to those territories and colonies which were formerly under the sovereignty of the defeated Central Powers. Thus the colonies and other dependencies of the Principal Allied and Associated Powers were not immediately affected by the application of the then emerging principle of self-determination.

The point that may be emphasised regarding the evolution of self-determination is the introduction of the terminology into contemporary international legal literature.

The term self-determination originates from "a metaphor borrowed from the language of metaphysical speculation",<sup>18</sup> and the expression gained its first legal formulation in the Soviet Union. The principle of self-determination first found its embodiment in the "Decree of Peace" issued

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17. See Sureda, op. cit., p.20.; and on the application of self-determination after the First World War, see below section (ii); Umozurike, "International Law and Self-determination in Namibia", in Journal of Modern African Studies, Vol. 8, 1970, p. 585.

18. Michla Pomerance, "The United States and Self-determination: Perspectives on the Wilsonian Conception", in American Journal of International Law, Vol. 70, pp. 1-2 (1976).



on 8th November, 1917 by the Federal Socialist Republic of Russia. The Russian Decree is a unilateral declaration stipulating that all peoples and nations have the right to exercise self-determination. Between 1920 and 1922 the Russian government concluded a series of treaties which were based on this principle.<sup>19</sup>

In attributing credit to the Russian efforts regarding the development of self-determination, Michla Pomerance writes: "Popularization of the term even then owed more to the Bolsheviks than to Wilson, and in no small measure,

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19. These were Treaties concluded in 1920 between Russia and Estonia, Latvia and Luthuania and the Khorezm People's Republic, and the treaties of 1923 between Russia and Persia, Afghanistan and Turkey.
- The Russian expression was: "Peace without annexation and indemnities on the basis of the self-determination of peoples". The first official statement of war aims to employ the term "self-determination" was made by the Russian Provisional Government on April 9, 1917; see Arno J. Mayer, Political Organs of the New Diplomacy 1917-1918, (1959) p.75. Treaty of Peace between Latvia and Russia describes the principle of self-determination in the following manner: Article 2: "By virtue of the principle proclaimed by the Federal Socialist Republic of the Russian Soviets which establishes the right of self-determination for all nations, even to the point of total separation from the States with which they have been incorporated, and in view of the desire expressed by the Latvian people to possess an independent national existence. Russia unreservedly recognises the independence and sovereignty of the Latvian State and voluntarily and irrevocably renounces all sovereign rights over the Latvian people and territory which formerly belonged to Russia under the then existing constitutional law as well as under international Treaties which, in the sense here indicated, shall in future cease to be valid. The previous status of subjection of Latvia to Russia shall not entail any obligation towards Russia on the part of the . . . . /

Wilson's espousal of the principle of self-determination as a central element of the peace was reactive to both Bolshevik initiatives and wartime exigencies."<sup>20</sup> However, Pomerance goes on to say that, the concept of self-determination as a principle of the "consent of the governed" had been embraced by Wilson much earlier<sup>21</sup> when he referred to it in relation to the First World War as early as November 4, 1915.<sup>22</sup>

It must be noted however, that at the time of the conclusion of the Versailles Treaty of Peace (1919-1923) and the establishment of the League of Nations (1919), the parties to those treaties did not consider it necessary to include in them any provision concerning self-determination, since the majority of the Principal Allied and Associated Powers possessed colonies in Africa and elsewhere. For the Colonial Powers self-determination meant self-destruction of their empires. On this point of failure to include provisions on self-determination in the Peace Treaties,

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19. Continued ....

Latvian people or territory", see League of Nations Treaty Series Vol.2, 1920-1921, p.213. Under the Lithuanian and Soviet Government, Treaty of Peace of July 12, 1920, self-determination is mentioned in Article 1. See League of Nations Treaty Series Vol.3, pp. 122-123.

20. See Pomerance, loc. cit., n.18, above.

21. See for example, Wilson's addresses of September, 6, 1919 at Des Moines and September 18, 1919 at San Francisco, in 2 R.S. Baker and W.E. Dodd (eds), War and Peace: Presidential Messages and Public Papers (1917-1924), pp. 65, 68, 98. (Washington, 1927). For Wilson's thoughts on self-determination, see generally, Hartley Notter, The Origins of the Foreign Policy of Woodrow Wilson, (Washington, 1937).

22. In one of his addresses, Wilson had emphasised America's belief in "the right of every people . . . . /



A.R. Sureda writes the following:

When the moment arrived at the peace negotiations to fulfill the pledges of self-determination given by the Allies to the nationalities integrated into the Central Empires, the difficulties of applying self-determination, and the limitations to which such a principle must be subject, became apparent. Historical claims, economic needs and military and strategic arguments prevailed. The principle did not find a place in the Covenant which was supposed to constitute the framework within which international relations should be conducted after the war ....<sup>23</sup>

However, self-determination was only reflected in the plebiscites conducted in Europe by the Allies in the aftermath of the war, and the principle is apparent in the minority treaties, and the mandates regime of Article 22 of the Covenant.

Before entering on an exposition of the content of the section on the Mandate System, it is necessary at this early stage to comment on the basic question of the legal status of the principle of self-determination from the period of the French Revolution (1848) to the time of the Peace Treaties (1919-1923). I have shown in my discussions above how from 1848, the principle of nationality was transformed into the concept<sup>24</sup> of self-determination. At that time the concept of self-determination had only gained recognition at national level; and as such could only be

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22. continued ....

to choose their own allegiance and be free of masters all together", see Baker and W.E. Dodd (eds), The New Democracy: Presidential Messages, Addresses, and Other Papers, 309 (Washington, 1926). "Fourteen Points", see M.M. Whiteman, Digest of International Law, Vol. 5, pp. 42-43 (Washington D.C., 1965).

23. See A.R. Sureda, op.cit., pp. 21-22; see also C.A. Macartney, National States and National Minorities (London, 1934) pp. 172-208.

24. See discussion above.

regarded as having had acquired only national but not international legal status. Thus, self-determination became a legal right of the nation that had exercised it and transformed the idea into its national law. Before the Peace Treaties the concept of self-determination had become a legal right, e.g. for the peoples of France, Italy and Soviet Russia who had entrenched it in their national constitutions. But self-determination acquired its first international legal status when the concept was included into Peace Treaties<sup>25</sup> between Soviet Russia and Estonia, Latvia, Lithuania, etc., (1920-1922).

#### Section B. The League of Nations Period

##### 1. Evolution of self-determination through the League of Nations Mandates System

A further and very substantial development of the idea of self-determination was marked by its reflection in the mandates regime of Article 22 of the League of Nations. The Mandates System was established as a result of the detachment from Central Powers of their colonies and territories after the First World War. In fact, the Mandates System was the result of a compromise to avoid the possibilities of wars between the Principal Allied and Associated Powers themselves, over those former German and Turkish colonies and territories. Those former German and Turkish

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25. See above n.19.



colonies and territories were not annexed by the Principle Allied<sup>26</sup> and Associated Powers, but placed under the administration of various Mandatory Powers. This proposition was a restraint by the international community of states of the traditional principle of annexation of former enemy territories, in favour of the need "to promote international co-operation and to achieve international peace and security - by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations ..."<sup>27</sup> It becomes clear that the main objective in creating the Mandate System was to avoid armed conflicts between the parties to the Peace Treaties and the Covenant. Consequently, this fear of war may have influenced their decision to include an international mandate system in the Covenant. Since the wars influenced the decision to create the mandate regime, and also because the Covenant

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26. The Allies were at first reluctant to appeal to the principle of self-determination because they feared the effect this would produce on the nationalities forming part of the Russian empire. However, this obstacle was removed by the Russian revolution, which in itself affirmed the principle of self-determination. Another important factor in changing the Allies' policies in that respect was the fact that the United States entered the war, and by then (in 1917) the position of President Wilson on the issue of self-determination was already known, see R. Sureda, op.cit., p.20; see also above in section (I) of this chapter.

27. See Preamble of the Covenant of the League of Nations, op. cit.,

is silent on self-determination, it may be said that the Mandates System was not directly intended to promote self-government in the mandated territories, especially those in Africa. However the Mandate System was divided into three categories.<sup>28</sup> It has been noticed that unlike the A Mandates which had been granted provisional sovereignty under the Mandate System B and C Mandates were not accorded that status. Under paragraph (3) of Article 22, the character of the mandate differed according to the stage of the development of the people the geographical situation of the territory its economic conditions and other similar circumstances. Category A comprised certain communities formerly belonging to the Turkish Empire who were considered to have reached a stage in

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28. The Mandates Territories were divided as follows:-

A- Mandates

Iraq	Great Britain
Trans-Jordan	Great Britain
Palestine	Great Britain
Syria and Lebanon	France

B-Mandates

Cameroons	Great Britain and France
Tanganyika	Great Britain
Togoland	Great Britain and France
Ruanda-Urundi	Belgium

C-Mandates

North Pacific Islands	Japan
Nauru	Great Britain, Australia and New Zealand (Australia acting)
New Guinea	Great Britain, Australia and New Zealand (Australia acting)
Western Samoa	Great Britain, Australia and New Zealand (New Zealand acting)
South-West Africa (Namibia)	Great Britain and South Africa (South Africa acting)



their development (at the time when the Peace Treaties were negotiated and signed) that warranted their provisional recognition as independent nations. It was provided that A Mandates territories would remain under the mandate regime until such time as they were able to "stand alone", (paragraph 4, Article 22). The African and other "primitive" and less developed peoples (or communities) comprised the mandate category B and C. Although this classification is said to have taken into account both the political; economic development of the peoples concerned, in one hand, and the willingness or lack of it, of the progressive mandatories to accept more than nominal control of the mandates on the other hand, there was insufficient guarantee under the system that those people would achieve self-determination (or self-government). In fact it was through States practice and through the interpretation of Article 22 of the Covenant of the League of Nations by the Permanent Mandates Commission (P.M.C.)<sup>29</sup> that translated self-determination

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29. In February 1921 the League established the Permanent Mandate Commission. Its functions were to consider reports from Mandatory Powers and to advise the Council of the League on the observance of the mandate obligations. The Commission carried out its functions until the demise of the League in 1946. By then all A-Mandates territories had reached a civilised standard in their development, and hence attained independence. With the exception of South-West Africa, all territories subject to B- and C-Mandates were placed under the Trusteeship System of the United Nations.

into its practical and legal meaning.

An objective and critical analysis of Article 22 of the Covenant will reveal both the progressive and retrogressive aspects of the Mandate System. Article 22 did not expressly mention self-determination or self-government, but the principle is implicitly reflected therein. Under paragraph (1) of the Article it is stipulated that:-

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities of the performance of this trust should be embodied in the League's Covenant.<sup>30</sup>

It is apparent from the above citation that the principle which was applied, in order to create and promote the advancement of "New Civilised States" in those mandated territories inhabited by peoples not yet able to stand by themselves, was that the well-being and development of those peoples formed a sacred trust of civilisation. Securities of the performance of that trust was embodied in the League's Covenant. In other words the civilised States undertook the responsibility to create and promote what they considered to be Civilised States in those backward territories. Obviously, the yard stick used by the Council of the League of Nations, as an indication to decide whether a mandated territory had reached a

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30. See The Covenant of the League of Nations, loc. cit. n.1.



high standard of civilisation was the European legal-istic view that these territories were not yet able to govern themselves, hence they were to remain under an international tutelage, until they were considered able to govern themselves. Indeed, this is implied by the words "peoples not yet able to stand by themselves under the strenuous conditions of the modern world". This meant that since the colonial and dependent territories were political entities different from those of the European colonial powers, they could not be considered as "States". "The classical view was that the backward territories of Africa and Asia were not States in international law, since they were mostly considered incapable of exercising any form of international personality. Some writers have for this reason asserted that backward territories were devoid of any form of sovereignty".<sup>31</sup> Thus under the Mandates System, mandated colonies and territories were considered incapable of exercising any form of recognised sovereignty. The International Court of Justice in its 1950 Advisory Opinion on the South-West Africa (Namibia) case, reiterated that in the setting-up of Mandates System "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilisation'".<sup>32</sup>

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31. See F.C. Okoye, International Law and the New African States, (London, 1972) p.1.

32. See "International Status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, p.131; Solomon Slonim, "South-West Africa and the United Nations; An International Mandate in Dispute", in Harvard International Law Journal, Vol. 15, Number 1, Winter 1974, p.195.

The sovereignty of the mandated territories was entrusted to the League of Nations. Under a draft mandate agreement presented to the Sixth Committee of the League Assembly on 14th December 1920, the question was dealt with as follows:-

The relations between a Mandatory Power and a mandated territory differ in kind from those between a sovereign State and its dependencies. The Mandatory's status is not that of a proprietor, but of a trustee. He is not free to govern in his own interests by right of conquest. Such authority as he exercises over the inhabitants of the territory is exercised on behalf of the League of Nations; and it is conferred upon him solely with a view to serve their well-being and development and to open the territory to the trade and enterprise of all Members of the League. In accepting a Mandate he does not acquire the right of annexation. He assumes the duty of tutelage.<sup>33</sup>

The legal status of mandated territory is seen to be differentiated from that of a colony proper. The position of a colony was that it was conquered and colonized. It had no hope of gaining back its former independent status except perhaps through a liberation struggle. Mandates territories were left with the hope that one day they may become independent through the Mandate System, since it may be argued that there was an obligation on the Mandatory State to grant that independence. In accordance with the League of Nations Council resolutions,<sup>34</sup> adopted between 1920 and 1930, sovereignty of the mandate territory did

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33. League of Nations, First Assembly, Sixth Committee, (1920), pp. 353-4, cited in U.O. Umozurike, op. cit., pp. 38-9. See also J.C. Hales, "The Creation and Application of the Mandate System" in Vol. 25 Transactions of the Grotius Society, (London, 1929) pp. 185-204.
34. F.B. Sayre, "Legal problems arising from the United Nations Trusteeship System", in Vol. 42, The A.J.I.L. (1948), p. 263; Umozurike, p. 39, n. 41, For a long list of references see, P.Q. Wright, Mandates under the League of Nations, (Chicago, 1930), pp. 319-339; L.M. Goodrich, Law, Politics and the Security Council, 2nd Ed. (The Hague, 1969).



not lie with a mandatory state, it was vested in the League. After all, the Peace Conference conceived that the Mandate System was not merely an expedient limited to a particular situation, but also thought of it as something temporary in character. It was assumed it would come to an end when the various Mandated territories were able to stand by themselves. This assumption was later confirmed by the advisory opinion of the International Court of Justice (1971) on the case regarding the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276(1970). The Court held that:

It is self-evidence that the "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to possess a potentiality for independent existence on the attainment of a certain stage of development: the Mandates System was designed to provide peoples "not yet" able to manage their own affairs with the help and guidance necessary to enable them to arrive at the stage where they would be "able to stand by themselves."<sup>35</sup>

Although the Mandated territories were to exercise self-determination in the event of them reaching a certain stage in their development, the limitation to the possession of the potentiality for independent existence is revealed by the fact that the mandates regime did not provide for a specific period of time under which the peoples would be guided to independence. This limitation may be

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35. See "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Advisory Opinion, I.C.J. Reports (1971)" pp. 23-9.



interpreted as a denial of self-determination. The fact that the authors of the Covenant did not include provisions in it determining the termination of the mandates regime, reveals the weakness not only of that regime, but also of international law at that time regarding the question of self-determination. This denial of self-determination also confirms a point made earlier in this chapter, that international law of that time was largely the law of European nations alone.<sup>36</sup>

However, it was pointed out earlier on in this section that the development of self-determination through the mandates system was able to be realised due to States practice, and through the interpretation of

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36. To stress on the point that African and Asian nations did not take part in the making of old international law, it may suffice to cite two prominent jurists, viz., P.R. Anand and D. Schroder. Anand writes that: "present international law was developed during the last four Centuries and especially consolidated and systematized during the last part of the nineteenth and the beginning of the present Century. Asian and African countries had very little to do with it because they were conquered and colonized and made to serve merely the interest of the metropolitan States and their masters", see P.R. Anand, "Role of the New Asian Countries in the Present International Order", in American Journal of International Law, Vol.56, 1962, pp.384-385; and D. Schroder's observations go as follows: "the traditional community of nations is evidently the community of European States which encompasses not only the States of the European continent but also States governed by Europeans on other continents, such as Australia, Canada, New Zealand, South Africa and the United States of America. "Classical international law, the source of the law of nations still applied today by the traditional community of European States, is thus the international law of the European domination of the world, of European colonialism". See Dieter Schroder, "Das Verhaltnis der asiatischen, afrikanischen und lateinamerikanischen Staaten zur traditionellen Staatendemeinschaft und ihrem Recht", Loccumer Protokolle 12/1966, p. 60 & 63, cited by Bogor-Szego, New States and International Law, (Budapest, 1970) p.53.



Article 22 by the Permanent Mandates Commission. The Commission gave its view on the conditions for termination of the mandate regime. In its report to the Council, the Commission recommended that the release of a territory from a mandatory regime depended on two preliminary conditions being met:

- (1) The existence in the territory concerned of de facto conditions which justify the presumption that the country had reached the stage of development at which a people has become able, in the words of Article 22" to stand by itself under the strenuous conditions of the modern world.
- (2) Certain guarantees to be furnished by the territory desirous of emancipation to the satisfaction of the League of Nations, in whose name the Mandate was conferred and has been exercised by the Mandatory.<sup>37</sup>

The Commission found that whether a people under tutelage had become fit to stand alone without advice or assistance from the Mandatory State was a question of fact and not of principle. It laid down the following conditions which were to apply to the whole mandated territory and its population:

- (a) It must have a settled Government and an administration capable of maintaining the regular operation of essential services;
- (b) It must be capable of maintaining its territorial integrity and political independence;
- (c) It must be able to maintain the public peace throughout the whole territory;
- (d) It must have at its disposal adequate financial resources to provide regularly for normal Government requirements;
- (e) It must possess laws and a judicial organisation which will afford equal and regular justice to all.<sup>38</sup>

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37. See Umozurike, p.41.

38. See Luther Harris Evans, "The General Principles Governing the Termination of A-Mandate" in The American Journal of International Law, Vol.26, (Washington D.C., 1932) p.749.

It is seen that the peoples desiring emancipation had to meet all of these conditions mentioned above and the League was to be satisfied that the New State when created would fulfill its obligations. The Commission also suggested that the guarantees to be furnished by the mandated people before the regime ends should take the form of a declaration, treaty or convention, or any such equivalent instrument. Such an instrument would be accepted as binding the New State to honour its obligations. The Commission further suggested that the New State would undertake to ensure and guarantee:

- (1) the protection of racial, linguistic and religious minorities;
- (2) the privileges and immunities of foreigners in the former Ottoman Empire;
- (3) the interests of foreigners in judicial, civil and criminal cases;
- (4) freedom of conscience and public worship etc., provided that such activities do not interfere with maintenance of public order;
- (5) the financial obligations regularly assumed by the former Mandatory Power;
- (6) rights of every kind legally acquired under the mandate regime;
- (7) maintenance in force of international conventions, treaties etc., to which the Mandatory Power acceded on behalf of the mandated territory.

In realisation of self-determination, the question of Iraq's attainment of full legal independence and its admission<sup>39</sup> to the League of Nations served as a precedent. Iraq was one of those territories formerly belonging to the Ottoman's Empire, described in Article 22 of the League of Nations as having "reached a stage of development"

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39. On the question of admission of Iraq to membership in the League of Nations, see W.L. Williams, "The State of Iraq", in 8 Foreign Policy Reports (1932); see also, M.O. Hudson, "Admission of Iraq to the League of Nations", in The American Journal of International Law, Vol. 27, (Washington D.C., 1933) pp. 133-138.



warranting the grant of provisional sovereignty, subject to advice and assistance by a mandatory until such time as it was able to stand alone.

The Principal Allied Powers selected Britain as a Mandatory Power for Iraq, but no mandate was ever issued by the Council of the League of Nations. Instead, Great Britain and Iraq signed a Treaty of Alliance on October 10, 1922. On the basis of that treaty, Britain communicated the terms of its mandate over Iraq to the Council, on September 27, 1924. Those terms of the mandate gave "effect to the provisions of Article 22 of the Covenant."<sup>40</sup> Since the entry into force on December 19, 1924, of the Treaty of Alliance of 1922, the relations of Great Britain and Iraq had been based upon treaty. Another Treaty of Alliance between the two countries was signed on June, 30, 1930.<sup>41</sup> It came into force when Iraq was admitted to the League of Nations. The 1930 Treaty of Alliance which had then superseded the earlier Treaties of Alliance, constituted a birth-mark on the independence of Iraq. It provided that the two governments would have "full and frank consultations" on "all matters of foreign policy which may affect their common interests". The treaty also provides that Britain may establish air bases for its forces in Iraq; and that in the event of one party being

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40. See League of Nations Official Journal, 1924, p.1346; M.O. Hudson, International Legislation, Vol.1, (Washington, 1931), p.122.

41. See Cmnd. 3797, in British Treaty Series, No.15, (1931).

engaged in war, the other would come to its aid. In the same treaty, Iraq recognised that the "permanent maintenance and protection in all circumstances of the essential communications of His Britannic Majesty", was in the mutual interest of the two parties. The Anglo-Iraq Treaty of Alliance of 1930 was supplemented by financial<sup>42</sup> and judicial<sup>43</sup> agreements embodied in exchange of notes of August 19, 1930 and March 4, 1931, respectively.

Iraq was ruled by Britain under the League of Nations Mandates System for ten years and yet at the same time the mandated territory enjoyed a considerable and substantial amount of self-government. This is indicated by those Treaties of Alliance Iraq concluded with Great Britain. Furthermore, the United States of America entered into a convention with Britain and Iraq, on January 9, 1930 recognizing the special relations which existed between Iraq and Britain. It is observed that the United States recognition came before the decision was made by the League of Nations to terminate the mandate regime in Iraq. The decision by the U.S.A. to recognise Iraq's independence seems to have been taken on the basis of reports on the progress of events regarding the

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42. See British Treaty Series, No.15 (1931), Cmd. 3797; see also League of Nations Treaty Series, Vol. 118, p.231.

43. Registered with the Secretariat of the League of Nations, No.2807, September 9, 1931.

44. See U.S. Treaty Series, No. 835; League of Nations Treaty Series, Vol.115, p.473. Ratification of the convention were exchanged on February 24, 1931.



termination of the mandatory regime in Iraq, furnished to it by the Government of Great Britain. Although the U.S.A. was not a member of the League of Nations, on this occasion it had demanded to be furnished with information concerning conditions under which Iraq was to be administered upon the cessation of the Mandatory<sup>45</sup> regime. The U.S.A. claimed to retain the right to demand such information, arguing that she participated in the war against Germany, contributing to her defeat, and the defeat of her allies. She also based her argument on the principle established in 1921 that the approval of the U.S.A. was essential to the validity of any determination which might be reached regarding mandated territories. It is true that Britain had to report progress of events in Iraq to the League of Nations through the Permanent Mandates Commission, but Britain had no legal obligation to furnish reports to the U.S.A. However, in order to avoid any dispute with the U.S.A. which had demanded assurance that would "afford adequate protection to legitimate American interests in Iraq",<sup>46</sup> the British Government was willing to transmit information to the U.S. Government regarding the termination of Iraq's mandated regime. This act by the British Government was

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45. See, M.O. Hudson, "Admission of Iraq to the League of Nations", op. cit., p.137.

46. See, M.O. Hudson, "Admission of Iraq to the League of Nations", op. cit., p.137.

also in conformity with Article 17<sup>47</sup> of the Covenant of the League of Nations.

Since Iraq was the first territory under the Mandate System to apply for membership in the League of Nations, the Permanent Mandates Commission had to make a special study of the problems involved. At its 20th session (June 9-27, 1930), the Commission had given close attention to the British Government's special report<sup>48</sup> regarding the progress of Iraq under the mandate regime. The report was specially prepared by Britain for the purpose of giving the data to support its contention that Iraq was ready for emancipation. The Commission again took up the question of Iraq's emancipation<sup>49</sup> at its 21st session (October 26 - November 13, 1931), and upon the

47. Article 17 of the Covenant of the League of Nations provided that non-members of the League could be invited to accept membership of the organization for the purposes of settlement of disputes between themselves or between them and members of the League. The League could also invite a non-member State to take part in its activities or discussions. For instance, in 1931 the Council invited the United States to participate in its discussions on the question of Manchuria, see League of Nations Official Journal, 12th year, (1931), pp. 2322-2335.
48. See Special Report by His Majesty's Government.... on the Progress of Iraq during the Period of 1920-1931 (Colonial No. 58, 1931).
49. For the discussion of Iraq's emancipation by Permanent Mandates Commission, see Permanent Mandates Commission Minutes, especially at its 20th session, (June 9-27, 1931); 21st session, (October 26 - November 13, 1931), see also L.H. Evans. "The General Principle Governing the Termination of A-Mandate", op. cit., pp. 754-758.



examination of all the materials and information available to it, decided to recommend that Iraq be considered as satisfying the general conditions<sup>50</sup> regarding the termination of the mandate regime. At its 64th session on September 4, 1931, the League of Nations Council adopted a resolution containing the general conditions to be fulfilled before the mandate system could be brought to an end. These general conditions were to be applied not only regarding the case of Iraq's attainment of independence, but also concerning all other mandated territories. The Council then invited the Permanent Mandates Commission to submit its opinion on the proposal of the British Government for the emancipation of Iraq after consideration of the question in the light of the principles laid down. In a report which came before the Council on January 28, 1932, the Commission recommended that it was satisfied that Iraq had met the de facto conditions, concerning the termination of a mandated regime. The Council then accepted the recommendations of the commission, expressing its willingness to pronounce the termination of the mandatory regime in Iraq subject to certain undertakings by Iraq in accordance with recommendations of the Permanent Mandate Commission: (1) that Iraq should make a declaration to the Council promising that it would fulfill its obligations in accordance with the Council resolution; (2) that

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50. See Herbert W. Briggs, (Ed.), The Law of Nations, Cases Documents and Notes, Second Edition, (New York, 1966) - Case of Iraq: Conditions of Statehood required by the League of Nations for the Termination of A-Mandate, pp. 74-75; L.H. Evans, op. cit., pp. 742-758; above in this Section.

the League of Nations Assembly should see fit to admit Iraq to membership in the League. Then the Council recommended Iraq's admission.<sup>51</sup> On May 30, 1932, Iraq was made a Declaration<sup>52</sup> in which it stipulated such guarantees<sup>53</sup> as required under the recommendations of the Permanent Mandates Commission. And on July 13, 1932, the Secretary-General<sup>54</sup> informed the Council that the Iraq Government had duly signed and ratified the declaration. At its Sixth Plenary Meeting (October 3, 1932), the Assembly of the League of Nations unanimously voted for the admission of Iraq to full membership in the League. Sic, in accordance with the general principles providing for the termination of a mandate regime, and in the light of certain guarantees met by Iraq, the country attained full sovereignty and independence. The termination of the mandate regime gave way to the creation of the new independent State of Iraq. This marked the beginning of the realisation of self-determination in the League of Nations era, by the mandated territories and colonies.

After having examined the questions of creation and termination of a mandate regime, it is necessary

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51. For the Council discussion, see League of Nations Official Journal, 1932, pp. 1213-1216.

52. For the full text of the declaration see League of Nations Official Journal, 1932, pp. 1347-1350; M.O. Hudson, International Legislation: Vol. VI, 1932-1934, (Washington, 1937), pp. 39-47.

53. See L.H. Evans, "The General Principles Governing the Termination of A-Mandate", op. cit., p.750.

54. See League of Nations Official Journal, 1932, p. 1483; L.H. Evans, id., p.758.



to proceed with consideration of other provisions of Article 22 of the Covenant of the League of Nations.

Paragraph (2) of Article 22 which describes the international guardianship regime under which the dependent peoples were to be governed provides that:

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations which, by reason of their resources, their experience or their geographical position, can best undertake this responsibility and which are willing to accept it, and this tutelage should be exercised by them as Mandatories on behalf of the League.<sup>55</sup>

It is under this provision that Mandatory Powers had to enter into agreement with the League of Nations concerning the governing of a mandate territory. The international regime of each mandated territory depended upon the treaty establishing it, and such treaties were similar in most cases.

The mandated territories were placed under the international tutelage administration in accordance with the provision of Article 22, as well as under such Mandates Agreements.<sup>56</sup> Since the Mandatory States were acting "on behalf of the League"; even though mandates were drafted by the States and eventually accepted by the Council of the League of Nations on December 17,

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55. See Article 22 of the Covenant of the League of Nations, para. 2, n.1.

56. See Hungdah Chiu, The Capacity of International Organisations to conclude Treaties, and the Legal Aspects of the Treaties so concluded, (The Hague, 1966), p.9: (a) Mandate Agreements . . . . /

1920, those agreements cannot be deemed to have been concluded between the League and the Mandatory States. In the opinion of Judges Spender and Fitzmaurice,<sup>57</sup> such agreements were regarded as Acts of the Council of the League of Nations, because under the Council's Resolution of 17th December, 1920 embodying the mandates, members of the League were not made parties to the mandates. Substantiating their opinion, they noted:

- (1) mandates were exercised on behalf of the League:
- (2) except for specific rights given by particular provisions to the members of the League, all obligations

56. Continued .....

Article 22 of the Covenant established the Mandate System which applies to those territories over which Germany renounced all rights and titles "in favour of the Principal Allied and Associated Powers" by Article 119 of the Treaty of Versailles and to the territories defined as Mandates in Part III, Section 7, of the Peace Treaty of Sevres, signed on August 10, 1920, the status of which was not changed by the Peace Treaty of Lausanne with Turkey, signed on July 24, 1923. The administration of these territories was allocated among Mandatory States by decision of the Principal Allied and Associated Powers taken at the Paris Peace Conference on May 5, 1919, and at San Remo on April 25, 1920. Mandates were drafted by the Mandatory States and eventually accepted by the Council of the League of Nations on December 17, 1920, for the five C-Mandates, on July 18 and 20, 1922, for the six B-Mandates, on July 24, 1922 for Palestine and Syria and Lebanon, and September 16, 1922 for Transjordan. The Texts of the Mandate Agreements were printed separately by the League of Nations, and they are collected in M.O. Hudson, International Legislation, Vol.1, (Washington, 1931), pp. 44-126.

57. See "South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December, 1962, I.C.J. Reports 1962, pp. 465-563 - Joint dissenting . . . . /



under the mandate were owed to the League of Nations; and (3) mandates could only be modified with the consent of the whole Council of the League. After all, under paragraph 7 of Article 22, of the Covenant of the League of Nations, it is provided that in every case of the mandate, the Mandatory would render to the Council an annual report in reference to the territory committed to its charge. It may be concluded that since the Mandatory States acted on behalf of the League; submitted annual reports to the Council; and because the agreements were regarded as Acts of the Council, the Mandate Agreements were not agreements stricto sensu or even stricto jure. They were simply Acts of the Council of the League of Nations.

Under paragraph (5) (Article 22) relating to mandates in category B and most specifically to Central African territories, it is stipulated that:

Other peoples, especially those of Central

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#### 57. Continued.....

opinion of Judges Spender and Fitzmaurice - the judges found that the League Council required that the Mandate States communicate to it their proposed terms for the Mandates, in order that the Council might satisfy itself that they were in conformity with Article 22 of the Covenant, and the Council would then, by its own act, give these terms the force of law, id., p.486; V.S. Mini, "The Advisory Opinion in Namibia Case: A Critique", in I.J.I.L., Vol. 11, 1971, p.467.

Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals, the prohibition of abuses, such as slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory and will also secure equal opportunities for the trade and commerce of other Members of the League".<sup>58</sup>

It was under this above provision that the former German colonies in Africa which were "inhabited by barbarians, who not only cannot possibly govern themselves, but to whom it would be impracticable to apply any ideas of political self determination in the European sense",<sup>59</sup> were placed under the mandate regime. It is evident

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58. See Article 22 of the Covenant of the League of Nations. For information on the League of Nations Mandates System: general rules, see League of Nations Treaty Series, Vols. I, III IV V, VI and VII, on individual rights for League Members, Vols. III, IV and V, id.; on the administration, judicial supervision and control, Vols. I, II, III, IV, V, and VII id.; and on the termination of the Mandates Regime, Vol. VII id.
59. See Umozurike, p.31 citing D.H. Miller, The Drafting of the Covenant, (London, 1928), 2:23-60; M. Pomerance, "Methods of Self-determination and the argument of "primitiveness", in Canadian Yearbook of International Law, Vol. 12, 1974, pp. 38-66.



that paragraph 5 of Article 22 of the League of Nations, does not prescribe whether the peoples of the Central African territories would ever achieve self-determination. Failure of this provision to stipulate in precise terms the period of time under which the African mandated territories would be governed before they could be released from the mandate regime, constitutes a denial of self-determination. However, despite that denial, President Wilson in his second Paris draft of the Covenant, had extended self-determination to all colonies and territories under the mandate regime:

The object of all such tutelary oversight and administration on the part of the League of Nations shall be to build in as short a time as possible a political unit which can take charge of its own policies. The League may at any time release such people or territory from tutelage and consent to its being set up as an independent unit.<sup>60</sup>

What President Wilson was proposing was that the period of time under which a mandated territory could be administered while it is evolving into an independent political unit, should have been as short as possible. He was also proposing that after that short period of time under tutelage, the League of Nations might grant political independence to the peoples or territories placed under the mandate system. But this proposal by President Wilson was not included in Article 22 of the Covenant of the League of Nations.

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60. See Miller, op. cit., 2:104. For the full text of the first Paris Draft Covenant, see pp. 65-93 and for the second pp. 98-105.

Nevertheless, although paragraph (5) of Article 22 of the Covenant of the League of Nations does not provide when a mandate regime in the Central African territory could be ended, under this same paragraph, the Mandatory States had the responsibility and obligation to create "... peace, order, and good government,"<sup>61</sup> in the mandated colonies. For the purpose of creating peace, order and good government, paragraph (5) of Article 22 provides for the establishment of military and police training for the natives, for the purpose of policing and defending the territory. This means that the Mandatory State could establish political, economic or social institutions, provided that these were established in conformity with the provisions of the Covenant of the League of Nations, and in accordance with the mandate regime and agreements. Since the Mandatory States administered the mandated territories or colonies on behalf of the League of Nations, it may be said that the League had the discretion to end the tutelage regime after such a period of time as it seemed long enough to warrant termination of the regime. This means that the League of Nations could end the tutelage regime upon satisfaction that the international objectives for which the system was created have been met: "The Mandate was created, in the interest

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61. See Text of the British draft Covenant of the League of Nations, in D.H. Miller, id., 1:106-7. cited in Umozurike, p.31. The British draft Covenant did not however, lay down that self-determination was the final goal for the mandated territories or colonies.



of the inhabitants of the territory, and of humanity in general, as an international institution with an international object - a sacred trust of civilisation."<sup>62</sup>

According to paragraph (6) of Article 22, category C of the Mandate System were territories:

such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from centres of civilisation, or their geographical contiguity to the territory of the Mandatory, or other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above-mentioned in the interests of the indigenous population.<sup>63</sup>

This particular provision which mentions the then existing legal status of Namibia (South-West Africa), does not in any way provide for exercise of self-determination by the indigenous peoples of that territory. Furthermore, when the Council of the League of Nations placed Namibia (South-West Africa) under the Mandate of "His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the territory ..."<sup>64</sup>

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62. See "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)" Advisory Opinion, I.C.J. Reports (1971), p.29.

63. See The Covenant of the League of Nations, Article 22; Annexes to the Memorials of the Government of Ethiopia, in International Court of Justice: Pleadings, Oral Arguments, Documents, South-West Africa Cases: (Ethiopia v. South Africa; Liberia v. South Africa), Vol. I, 1966, (The Hague, 1966), pp. 200-201 - Annex A-Covenant of the League of Nations Article 22; Memorial of the Government of Ethiopia, in Advisory Opinion, I.C.J. Reports (1971), pp. 12-14.

64. See I.C.J. Reports (1971), pp.487-88; I.C.J. Pleadings, Vol. I. South-West Africa Cases, pp. 201-202; Hudson, op. cit., Vol. I, pp. 57-60.

there was no provision in the "Mandate for German South-West Africa",<sup>65</sup> stipulating when or whether the indigenous peoples of the territory would exercise self-determination. Indeed, there was no provision in the above-mentioned Mandate stipulating the duration of the Mandate. This failure to state in the Mandate Agreement the date of termination of the Mandate, in my opinion constitutes one of the weaknesses of the mandate regime of the League of Nations as regards promoting self-government, which would lead to the creation of a State by the indigenous peoples of a mandated territory.

However, no matter how weak the mandate regime might have been, the same principles that were applied to the other mandated territories (A or B Mandates) had to be applicable to territories of C-Mandate category, viz., the principle of non-annexation and the principle that the well-being and development of the indigenous people form "a sacred trust of civilisation". With a view to giving practical effect to those/principles, Article 22, paragraph 6 of the Covenant goes on to stipulate that C Mandate territories could be best administered under the laws of the Mandatory as integral portions of its territory. But the Mandatory was required to safeguard interest of the indigenous population. In relation to the Mandate C category (as with the other

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65. See Mandate for German South-West Africa, op. cit., pp. 487; 201; and pp. 57, respectively.



two categories), the Mandatory Power was required to submit to the League Council annual reports in reference to the territory under its administration, authority and control. In other words, and in general, the mandate regime which governed C-Mandate territories was not to be differentiated from that which governed A and B Mandated territories. In its Advisory Opinion the International Court of Justice was:

unable to accept any construction which would attach to "C" Mandates an object and purpose different from those of "A" or "B" Mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular Mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under "C" Mandate belonged to the family of Mandates only in name, being in fact, the objects of disguised cessions, as if the affirmation that they could "be best administered under the laws of the Mandatory as integral portions of its territory" (Article 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with "A" or "B" Mandates.<sup>66</sup>

Earlier on, in its 1962 Judgment in the South-West Africa Cases, the Court held that:

The rights of the Mandatory in relation to the Mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and there are, so to speak, mere tools given to enable it to fulfill its obligations.<sup>67</sup>

The latter citation in which the Court states that the cases of Namibia can be applied to all categories of Mandates, it is clear that a Mandatory Power had certain obligations which were derived from the rights it had as a Mandatory. But these rights and obligations were

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66. See I.C.J. Reports 1971, p.32.

67. See I.C.J. Reports 1962, p.329

of the same nature in all cases of the Mandates.

In summary it may be stated that the salient points which emerge from the discussion in this subsection are as follows:-

1. Classical international law did not provide for the promotion of self-determination for the peoples of Africa. During the League of Nations period instead, self-determination was implicit in the Mandate System.

2. Although Article 22 of the Covenant of the League of Nations which established the Mandate regime, was to a certain extent a limitation of the potential exercise of self-determination by African Mandated territories because its provisions did not stipulate in precise terms, when or whether the Mandate regime would terminate, it (Article 22) nevertheless, laid down the foundation upon which self-determination was developed during the League of Nations period.

3. Objective and constructive analysis of all aspects of the Mandate System have revealed that it was through interpretation of the Mandate regime by the League of Nations (especially through the functions of its Council and Permanent Mandate Commission), that self-determination through the Mandate System was realised by the peoples in mandated territories.



4. Despite any limitations mentioned above, it can be deduced that to a certain extent, the Mandate System<sup>68</sup> laid down a foundation upon which rested the further development of self-determination and formation of self-determination into a norm of contemporary international law.

### Section C. Self-Determination in the United Nations Era.

#### 1. Charter provisions and United Nations practice

One of the purposes of the United Nations is:-

to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.<sup>69</sup>

The inclusion of the idea of self-determination into the Charter of the United Nations marked a turning point in the transformation of self-determination after the Second World War. The process to include self-determination into a document of world wide international character began at the United Nations Conference<sup>70</sup> on International Organisation held in San Francisco in 1945. At the San Francisco Conference, self-determination was mentioned

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68. See J.C. Hales, "Some legal aspects of the Mandate System: Sovereignty - Nationality - Termination and Transfer", in Transactions of the Grotius Society, Vol. 23, (London, 1938); id. "The creation and Application of Mandate System", Vol. 25, (London, 1940).

69. See Charter of the United Nations, Art. 1. para.(2), in Ian Brownlie, Basic Documents in International Law, Sec.Ed., (Oxford, 1972), pp.1-31.

70. See Documents of the United Nations Conference on International Organization San Francisco, 1945, Vol. 2, (London/New York, 1945), pp. 1-628.

in the drafts documents presented by the representatives of China, United States of America, United Kingdom and the Soviet Union.<sup>71</sup> The principle of self-determination is contained in Articles 1(2) and 55 of the U.N. Charter. This means that self-determination had become one of the objectives of the United Nations. Indeed, its inclusion in the U.N. Charter marks a turning point as regards its legal development and application. When the U.N. Charter entered into force, self-determination acquired its international legal status and to gain its acceptability as one of the most fundamental principles of modern international law. The principle of self-determination formed the legal basis upon which the U.N. Decolonisation process was conducted world over, (including in the African Continent). Unlike during the League of Nations period, in the United Nations era self-determination has become a universally recognized principle of international law. The principle acquired its international legal recognition through State practice, as well as through the practice of the United Nations.

Other U.N. documents of substantial importance regarding the legal ascertainment of the principle of self-determination are the U.N. Covenants<sup>72</sup> on Human Rights, viz. International Covenant on Economic, Social

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71. See id. Doc. 2 (English) G/29, May 5, 1945, Amendments Proposed by the Governments of the United States, The United Kingdom, The Soviet Union and China, pp. 622-628.

72. For the full texts of the Covenants, see Brownlie, Basic Documents in International Law, op. cit., pp. 150-181.



and Cultural Rights; International Covenant on Civil and Political Rights; and the Universal Declaration of Human Rights.

These U.N. Covenants on Human Rights contain an identical Article 1 on the right of self-determination. Paragraph (1) of each of those identical Articles stipulates that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".<sup>73</sup> The Covenants on Human Rights are the first international legal instruments of a global character in which self-determination is formulated as a legal right, and not merely a political or moral phenomenon. This means that on the international plane, the concept of self-determination was given legal content by the coming into force<sup>74</sup> of those United Nations Covenants on Human Rights. However, the limitation to that international

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73. See id., op.cit., pp. 152; 162.

74. See S. Prakesh Sinha, "Human Rights Philosophically", in The Indian Journal of International Law, Vol.18, (New Delhi, 1978), p.142, no.40. The International Covenant on Economic, Social and Cultural Rights - Adopted by General Assembly resolution 2200 A (XXI) of 16 December, 1966 - entered into force on 3 January 1976; in accordance with its Article 27; International Covenant on Civil and Political Rights - Adopted by same General Assembly resolution - entered into force on 23 March, 1976, in accordance with its Article 49; and Optional Protocol to the International Covenant on Civil and Political Rights - Adopted by General Assembly resolution 2200 (XXI) of 16 December, 1966 - entered into force on 23rd March, 1976 in accordance with its Article 9.

character of the Covenants is that they are binding only to States that have ratified or acceded to them. Such a limitation is obviously an inhibition to the application of the principle of self-determination. But nevertheless, the Covenants on Human Rights have "undoubted legal force as treaties for the parties to them".<sup>75</sup>

The principle of self-determination became the corner stone of the U.N. process on decolonisation, and once self-determination became a legal right its application could not be limited to particular territories or colonies expressing their will to become independent states. In the U.N. era, the international legal status of those African territories and colonies which were placed under the League of Nations Mandate regime changed. On the dissolution of the League of Nations in 1946, the mandated territories were placed under the U.N. Trusteeship System following individual agreements,<sup>76</sup> "agreed upon by the States directly concerned" and approved by the General Assembly under Article 85 for areas not designated

75. See Ian Brownlie, *op.cit.*, p. 150. *id.* Principles of Public International Law. (Sec.Ed., Oxford, 1973), p. 555; M. Gangi, International Protection of Human Rights, (Geneva, 1962).
76. Article 75 of the U.N. Charter stipulates that "The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed there-under by subsequent individual agreements. These territories are hereinafter referred to as trust territories"; O.O. Ayagi, "United Nations and African Decolonisation: Ineffectiveness of the Security Council", in Indian Journal of International Law, Vol.12, 1972, p.581; I.W. Zartman "Europe and Africa: Decolonisation and Diplomacy", in Foreign Affairs, Vol.54, 1976, pp. 324-343; W.L. Tung, International Organizations under the United Nations System, (N.Y. 1969).



as strategic, while the Security Council under Article 83 approved agreements relating to strategic areas.

A Resolution of the League of Nations adopted on 18th April, 1946 recalled that Article 22 of the Covenant of the League of Nations applied to certain territories placed under the Mandate regime "the principle that the well-being and development of the peoples not yet able to stand alone in the strenuous conditions of the modern world form a sacred trust of civilisation".<sup>77</sup> In paragraph 3 of the same resolution it is pointed out that on termination of the League's existence, its functions with respect to the mandated territories would come to an end but in the same place, it is noted that Chapters XI, XII and XIII, of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League of Nations. This resolution shows a continuity in the development of self-determination through the League of Nations Mandate System, into the United Nations Trusteeship System and such other relevant U.N. regimes provided for under the U.N. Charter. It means that the Mandate regime under Article 22 of the Covenant was transformed into the U.N. Trusteeship System. One of the basic objectives of the trusteeship system was to:

promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and

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77. See I.C.J. Reports 1950, p.134.

their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.<sup>78</sup>

From the above citation, it may be concluded that the only territories which were to be placed under the trusteeship system were those whose peoples had not yet attained self-government or independence. The meaning of the word "self-government" used in Article 76 (b) may only be said to be synonymous to the word "independence".

Under the U.N. Trusteeship System all categories<sup>79</sup> of the territories which were placed thereunder had the right to exercise self-determination. To implement the trusteeship system rules, the U.N. closely followed the progress being made in the trust territories towards the attainment of political independence. Under the authority of the U.N. General Assembly, the Trusteeship Council carried out the functions of supervising the administration of the trust territories, (see U.N.

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78. See U.N. Charter, Article 76 (b).

79. Under the U.N. Charter, Article 77 (I), the trusteeship system is divided into the following categories:-

- (a) territories formerly under the mandate;
- (b) territories which have become trusts after their detachment from Germany and her Allies as a result of the Second World War; and
- (c) territories voluntarily placed under the system by States responsible for their administration.



Charter Chapter XIII - The Trusteeship Council). Such African trust territories<sup>80</sup> as Tanganyika (Tanzania), Cameroon and Togoland have all gained their political independence (or reached statehood) in the 1950s and 1960s).

The U.N. decolonization process as regards the attainment of independence by all mandated territories of Africa is not yet complete. Namibia (South-West Africa) a former British mandated territory administered by South Africa, has yet to achieve political self-determination. When the Union of South Africa indicated its intention to incorporate Namibia, the United Nations General Assembly by resolution 65 (I) 14th December, 1946, withheld its consent and recommended a Trusteeship agreement with the General Assembly.<sup>81</sup> But in spite of that recommendation by the General Assembly, the Union of South Africa declined to enter into any Trusteeship agreement with the U.N.

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80. Territories of Tanganyika, the Cameroons, and the Togolands which were mandates under the League of Nations, became trust territories under the U.N. Trusteeship System. On the U.N. practice in implementing self-determination see, Josef L. Kunz, "The principle of self-determination of peoples, particularly in the practice of the United Nations, in The Selbstbestimmungsrecht de Volker, Vol. I, p. 132 (Munich, 1964).

81. See U.N. General Assembly Res. 65 (I) of 14 December, 1946 concerning the placing of South-West Africa (Namibia) under the International Trusteeship System, U.N. Doc. No. A/46/Add. 1. at 123 (1947).

In accordance with Article 65 of the Statute of the International Court of Justice, the General Assembly<sup>82</sup> in December 1949, requested the International Court for an advisory opinion regarding the International Status of the Territory of South-West Africa. The Court rendered its Advisory Opinion<sup>83</sup> on July 11, 1950. The main finding of the Court was that the mandate survived in its entirety. It held that the Union of South Africa had no obligation to place the territory of South-West Africa under the Trusteeship System of the United Nations, that the Union continues to have the international obligations stated under the Mandate System, that the Union acting alone has no competence to modify the international status of the territory of South-West Africa, and that

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82. The General Assembly submitted three additional questions to the International Court of Justice with a request for an advisory opinion. The request was put forward as follows: ".... What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular: (a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations? (b) Are the provisions of Chapter XII of the Charter applicable and if so, in what manner, to the Territory of South-West Africa? (c) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or in the event of a negative reply, where does competence rest to determine and modify the international status of the Territory?" see I.C.J. Reports 1950, p. 129.

83. For the International Status of South-West Africa (Namibia), Advisory Opinion, see I.C.J. Reports 1950, p. 128.



the Union is therefore, required to act with the consent of the United Nations in order to modify and determine the international status of the Territory of South-West Africa. But as time has shown, South Africa has refused to co-operate with the United Nations on the question of the exercise of the right to self-determination by the peoples of Namibia.

However, in 1966 when the International Court of Justice had rejected the claims of the Empire of Ethiopia and the Republic of Liberia<sup>84</sup> against the administration of South-West Africa by the South African Government, the United Nations General Assembly decided to terminate<sup>85</sup> South Africa's Mandate to administer South-West Africa (Namibia). The South African Government rejected the U.N. decision as unconstitutional and therefore, illegal. In its 1966 Judgment, the Court

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84. See "South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Second Phase; Judgment of 18 July, 1966," I.C.J. Reports 1966, pp. 1-51; Solomon Slonim, "Southwest Africa and the United Nations: An International Mandate in Dispute", in Harvard International Law Journal, Vol. 15, number 1, Winter 1974, p. 195.

85. On the termination of the Mandate for Namibia (South-West Africa), see United Nations General Assembly Resolution 2145 (XXI) of 27 October 1966. A full text of this Resolution can be found in Dusan J. Djonovich (Compiler and Editor), United Nations General Assembly Resolutions, Series I, vol. XI, 1966-1968, (N.Y. 1975), pp. 118-119. Close analysis concerning the termination of the Mandate for South-West Africa is given by the I.C.J. in its Opinion of 1971 on Namibia, see I.C.J. Reports 1971, pp. 50-56. Although by Resolution 2145 (XXI) the General Assembly terminated the Mandate, lacking the necessary powers to ensure the withdrawal of South Africa from Namibia, it enlisted the co-operation of the Security Council by calling the latter's attention to the resolution, thus acting in accordance with Article II, paragraph 2, of the U.N. Charter. Security Council Resolutions called for the withdrawal of South Africa from Namibia; see Council Resolutions: 2451 (1968); 246 (1968); 264 (1969); 269 (1969); and in its Res. 276 (1970), reaffirmed General Assembly Resolution 2145 (XXI).



found that the Applicants could not be considered to have established any legal right or substantive interest in the subject matter of the claims and that accordingly, the Court, by the President's casting vote, decided to reject the claims of Ethiopia and Liberia. The main reason why the United Nations General Assembly decided to terminate the mandate was because of South Africa's defiance to relinquish its territorial possession of Namibia. This in itself constitutes a denial to exercise self-determination by the people of Namibia.

On July 29, 1970 the United Nations General Assembly requested the International Court of Justice to give its Advisory Opinion regarding ".... the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)".<sup>86</sup> In its Advisory Opinion of 1971, the Court pointed out that the continued presence of South Africa in Namibia was illegal, and that South Africa was under obligation to withdraw its administration from Namibia immediately, and thus put an end to its occupation of the territory. But South Africa refused to comply with

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86. See I.C.J. Reports 1971, (Namibia 'South-West Africa' Advisory Opinion), pp. 1-58. Advisory Opinion delivered the morning of June 21, 1970; by 13 votes to 2, the Court held the Opinion: (1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory; by 11 votes to 4, (2) that States Members of the U.N. are under obligation to recognize the illegality of South Africa's presence in Namibia and invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration; (3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.



that Advisory Opinion of the International Court of Justice.

However, it is true that despite previous unsuccessful attempts to settle the Namibian independence question, the U.N. is continuing to assist the people of Namibia to achieve their political independence. Due to pressures from various quarters opposed to the politics of South Africa in Namibia, the South African Government has now begun to co-operate<sup>87</sup> with the United Nations in order to enable the people of Namibia to exercise their right to self-determination.

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87. See U.N. Chronicle Vol. XVI, Numer I, January 1979, Record of the Month of December, 1978: "South Africa to co-operate in Namibia Independence Plan". South Africa informed the United Nations Secretary General, Kurt Waldheim, that it had decided to co-operate in the expeditious implementation of Security Council resolution 435 (1978) embodying a plan designed to pave the way for elections leading to Namibia's independence. This South African position was contained in a letter dated 22 December, 1978, from the South African Foreign Minister of Affairs, R.F. Botha to the U.N. Secretary-General. Earlier on, on 10th April, 1978 a proposal was put forward by the five Western members of the Security Council - Canada, France, the Federal Republic of Germany, the United Kingdom and United States - for a settlement of the Namibian situation in the light of Security Council resolution 385 (1976) (S/12636) - for text of the proposal see U.N. Chronicle Vol. XV, Number 8, August - September, 1978, p.54. On 30th March, 1978 the Permanent Representatives of Canada, France Federal Republic of Germany, U.K. and U.S.A. had handed a communication to the Secretary-General containing the Proposal relating to the exercise of the right of self-determination by the people of Namibia. The Proposal called for the holding of free elections for the whole of Namibia as one political entity, to enable the people of Namibia to freely and fairly determine their own future. For reference to other U.N. resolutions on Namibia see U.N. Chronicle Vol. XVI Number 5, July 1979: "Namibia - General Assembly Calls on Council for Action Against South Africa", pp.15-20.



Apart from the territories which were under the Trusteeship System, there were non-self-governing territories which were directly administered by the colonial powers. Chapter XI (Articles 73 and 74) entitled "Declaration Regarding Non-Self-Governing Territories" prescribes an international legal regime concerning the development of self-determination by the colonial peoples. All African colonial countries came under this category. Under this declaration the Administrative Authority has the responsibility and the obligation to promote self-determination in the administered territory. To this effect, Article 73(b) specifically states that the administrative government has the responsibility "to develop self-government ..." <sup>88</sup> and to assist the administered peoples in the progressive development of their free political institutions, which would lead to the establishment of independent States. <sup>89</sup>

The U.N. Trusteeship System rules and the principle embodied in the Declaration regarding non-self-governing territories, provided the legal basis upon which the international community together with the colonial

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88. See U.N. Charter, Article 73(b).

89. Many definitions of a State have been given by various writers. With a view to showing the different legal status that existed in dependent and independent countries, I give below, two citations from Vidya Dhar Mahajan's Public International Law, (Delhi, 1973), pp. 116; . . . . /



peoples would strive to remove colonialism and establish independent states.

To effect those principles laid down in the Charter, the U.N. has adopted, and continues to adopt, specific resolutions concerning self-determination in general, and in particular, concerning the granting of political independence to specific African countries<sup>90</sup> whose "peoples have not yet attained a full measure of self-government", (see U.N. Charter Article 73 'preamble'). In the general context, the principle of self-determination was expressly referred to, as meaning "the right of peoples and nations" to determine their own future, in

#### 89. Continued ....

"A State proper - in contradiction to colonies and dominions - is in existence when the people are settled in a country under its own sovereign government", thus Oppenheim's definition. According to Fenwick, "As understood in international law, a State is a permanent organized political society, occupying a fixed territory and enjoying within the borders of that territory freedom from control by any other State, so that it is able to be a free agent before the world", *ibid.*, p.116; Edward Dumbauld, "Independence under International Law", in American Journal of International Law, Vol.70, 1976, pp. 425-431; J.J.G. Syatauw, Some Newly Established Asian States and the Development of International Law, (The Hague, 1961); W.V. O'Brien The New Nations in International Law and Diplomacy, (London, 1965); R. Khan, "International Law: Old and New", in I.J.I.L. Vol.15, No.3 1973; H.W. Briggs, The Progressive Development of International Law, (Istanbul, 1947).

90. See U.N. Resolutions on the right of self-determination of peoples of Angola, Mozambique, Namibia, Southern Rhodesia (Zimbabwe), and South Africa (Azania) e.g. General Assembly . . . . /

U.N. General Assembly Resolution 637 A (VII) of 16 December 1952.<sup>91</sup> In that resolution the General Assembly recommended that:

- (1) The States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations;
- (2) The States Members of the United Nations shall recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing Trust Territories who are under their administration and shall facilitate the exercise of this right by peoples of such Territories according to the principles and spirit of the Charter of the United Nations in regard to each Territory and to the freely expressed wishes of the peoples concerned, the wishes of the peoples being ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations.<sup>92</sup>

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90. Continued....

resolution 1742 (XVI) regarding self-determination in Angola; Security Council resolutions: 385 (1976), 435 (1978), 439 (1978) all concerning exercise of self-determination by the people of Namibia; General Assembly resolution 1747 (XVI) 28 July, 1962, concerning the International Legal Status of the Territory of Southern Rhodesia; Security Council resolution 423 (1978) declaring as illegal and unacceptable any internal settlement under the auspices of the illegal regime and calling upon all States not to accord any recognition to such internal settlement, (see also U.N. Chronicle, Vol. XV. Number 4, April 1978: "Southern Rhodesia Internal Agreement Declared Unacceptable", pp.23-32; id. /Statements by Zimbabwe Front Leaders in Security Council", pp. 76-87.

91. See U.N. General Assembly Resolution 637 (VII) of 16 December, 1952, concerning the right of peoples and nations to self-determination.

92. Ibid., Resolution A.



Self-determination is here referred to as a principle of international law and United Nations Member States are urged to recognize and promote the realization of the right of all peoples and nations to self-determination. It is also recommended that the wishes of the peoples expressing their desire to become independent should be ascertained through plebiscites or other internationally recognized democratic means. Such democratic means of ascertaining the wishes of the peoples could be organized under the auspices of the United Nations or States responsible for the administration of each given Trust Territory or Non-Self-Governing Territory. But as regards the exercise of self-determination by all (African) colonial peoples and nations, the U.N. adopted in 1960, the "Declaration on the Granting of Independence to Colonial Countries and Peoples".<sup>93</sup> The adoption of the Declaration was a great success regarding the realisation of self-determination by African<sup>94</sup> (and other non-self-governing) peoples and indeed a success for the development of the principle itself. The Declaration relates to the normative development concerning human rights and in particular, the right of peoples and nations to self-determination. In conjunction with the Charter of the United Nations, the Declaration, supports the view that self-determination is now a legal principle and a norm of contemporary international law.

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93. See U.N. General Assembly resolution 1514 (XV) 14 December 1960, "Declaration on the Granting of Independence to Colonial Countries and peoples"; see also U.N. Document ST/HR/1/Rev.I, Sales No.E.78.XIV.2, Human Rights - A Compilation of International Instruments (U.N., N.Y. 1978), pp.20; Brownlie, Basic Documents in International Law, pp. 187-189.

94. In 1960 alone, more than ten (10) African countries attained their political independence.



The Declaration proclaims the necessity of bringing colonialism in all its forms and manifestations to a speedy and unconditional end. It deplores the subjection of peoples to the yoke of foreign domination, and their exploitation, as denials of fundamental human rights, contradicting the U.N. Charter and hindering the development of co-operation and the establishment of international peace and security. Paragraph 2 of the Declaration stipulates that: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".<sup>95</sup> But perhaps what may be most important to note is that the Declaration on the Granting of Independence to Colonial Countries and Peoples, gives an interpretation of self-determination in a more detailed manner than any previous international legal instrument on the subject has ever done.<sup>96</sup> The Declaration provides the U.N. and colonial

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95. See U.N. General Assembly res. 1514 (XV) 14 December 1960.

96. For further references on Mandates and other dependences see, Quincy Wright, "Mandates", in the Encyclopaedia of the Social Sciences, Vol. 10, (N.Y. 1946), pp. 87-93; id., Mandates under the League of Nations, (Chicago, 1930), Duncan Hall, Mandates, Dependences and Trusteeship, (Washington, 1948), this book contains texts of the Trusteeship Agreements approved by the United Nations General Assembly, from 1946 onwards; id., "The International Trusteeship", in the British Yearbook of International Law, 1947, (London, 1947), id., "The British Commonwealth and Trusteeship", in International Affairs, Vol. XXII, (London, 1946); id., The British Commonwealth of Nations: A Study of its Past and Future Development, (London, 1920); T.B. Millar The Commonwealth and United Nations, (Sydney, 1967). On the United Kingdom Decolonization implementation see, the United Kingdom Command Papers, (Command Numbers given in each case) concerning self-determination and granting of independence to particular African countries, formerly United Kingdom colonies and dependences.



Peoples with a legal basis and a programme of action for the implementation of the right of self-determination.

In summary, it may be noted that the development of self-determination in the U.N. era has shown the transformation of the "idea of self-determination" into a principle and norm of contemporary international law. The principle of self-determination has become a legal right. The development of the right to self-determination in this era, (and in particular its exercise by African peoples and nations) is closely linked with the exercise of that right by two different types of dependent territories, namely, Trust Territories, and Non-Self-Governing Territories. The majority of the Trust and Non-Self-Governing Territories have now attained their political independence, thus exercising their legal right of self-determination.

## 2. African States Practice

When African States attained political independence, they expressed their adherence to the principle of self-determination in various ways. Some of them included the principle in their national constitutions. The preamble of the Constitution of the Republic of Congo stipulates: "The Congolese peoples solemnly proclaim the permanence of the spirit which ruled the revolution of August, 13, 14 and 15, 1963. It proclaims its attachment to the principle of self-determination and the free will of the peoples".<sup>97</sup>

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97. See Dorothy Peaslee Xydis, Constitutions of Nations, Vol. 1 - Africa, (Revised 3rd Ed. The Hague, 1965), p.85; M. Mushkat, "The African approach to some basic problems of modern international law", in I.J.I.L., Vol. 7, 1967, pp. 335-362.

A very important point emerges from the above citation concerning the "consent of the governed". The point is that the people have a right to freely express their will regarding the exercise of the right to self-determination. Under international law, it is a legal right that the people or nation desiring to exercise self-determination, freely express its will to that effect. Under national laws, the States provide legislation or other legal instruments protecting the exercise of the right of self-determination by the individual human beings under the jurisdiction of that particular State. It becomes clear therefore, that the Republic of Congo has under its national constitution guaranteed its peoples the right to express their free will in deciding the form of government or political system under which they wish to live.

The Gabonian<sup>98</sup> Constitution also proclaims the right to self-determination. It stipulates that by virtue of this right and other legal principles, the Peoples of Gabon adopted that constitution.

Another African State that has constitutionally proclaimed the principle is the Central African Republic. The Constitution provides that:

"The Ubangi people solemnly proclaims its attachment to the rights of man, to the principle of democracy and of self-determination of peoples".<sup>99</sup>

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98. See idem, op. cit., p. 194.

99. See loc. cit., p.50; A.B. Blaustein and G.H. Flanz, Constitutions of the Countries of the World, Vol. 3. (New York 1973).



It is observed that the entrenchment of the principle of self-determination in the Constitutions of African States is intended to affirm the legality of the principle. The entrenchment of the principle in some national constitutions illustrates that self-determination not only concerns the granting of independence to colonial and dependent territories, but also the fact that the principle is exercised by the individual man and woman in expressing his or her wish to be governed by the government of the particular country where the individual lives. Thus here one is talking about the exercise of what one regards as the internal aspect of the right of self-determination. What it means is that the individual human being (under both international and constitutional law), is accorded certain international and constitutional legal rights to participate in the election of a government in his or her country. In this context, the exercise of internal self-determination means - the right of freely elected representatives. This point is made clear in the Universal Declaration of Human Rights (Article 21), and the International Covenant on Civil and Political Rights (Article 2). Under Article 21 paragraphs (1) and (3) of the Universal Declaration of Human Rights, it is prescribed that:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives

(3) The will of people shall be the basis of authority of government; this will shall be

expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. 100

Article 2 paragraphs (1) and (2) of the International Covenant on Civil and Political Rights stipulates as follows:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>101</sup>

An objective analysis of those above-mentioned provisions, reveals that self-determination is supported by state practice externally as well as internally, and by the practice of the United Nations. This means that both national laws and the law of the United Nations may be employed to govern the exercise of self-determination. In fact, the newly independent African States endeavour to regulate fully, the exercise of the internal aspect of self-determination so as to show the international community how seriously committed they are towards legally interpreting this salient norm of contemporary international law. The provision of the principle of

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100. See Brownlie, Basic Documents in International Law, p.148,

101. See U.N. General Assembly resolution 2200 (XXI) of 16 December, 1966, "International Covenant on Civil and Political Rights".



self-determination in the internal laws of certain African States is regarded as refuting the idea that the principle is only a mere moral value.

One other point has to be made clear in support of the proposition that there is an international, as well as national, legal right that the individual human being has a right to exercise self-determination in his country. The point is that although the subject of the principle of self-determination is a people or a nation, the individual still exercises self-determination in the manner discussed above in this sub-section.

However, in the final analysis, it is observed that in the light of the effect of the Declaration on the Granting of Independence to Colonial Countries and Peoples, and also in accordance with the identical Article 1 of the International Covenants,<sup>102</sup> once a colonial or any other dependent country has attained full political independence, none of its parts has a right to secede.

The Charter of the Organisation of African Unity (O.A.U.) clarifies this position. It provides under Article 3 paragraph (3) that the O.A.U. Member States shall have respect for the sovereignty and territorial integrity, and the desire to protect the newly gained independence is what prompted the O.A.U. to include that provision in the Charter.<sup>103</sup> This position of the O.A.U.

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102. See id., Article 1 of the Covenants.

103. See Charter of the Organization of African Unity (O.A.U.), Brownlie, Basic Documents in International Law, pp. 68-76.

to outlaw secession or self-determination, once a country has gained independence is discussed in detail in Chapter 5 of this work.<sup>104</sup>

Apart from fixing the principle of self-determination in their normal constitutions, some African States have included it in international agreements. There are independence agreements entered into between a national liberation movement<sup>105</sup> and a colonial administration at the time of granting independence to a particular African country. All the former European Colonial Powers have entered into such independence agreements with one or more of their former African dependencies. On September 7, 1974, the Portuguese Government and the Front for the Liberation of Mozambique (FRELIMO) signed an "Agreement concerning the self-determination and Independence of Mozambique".<sup>106</sup> This Agreement which marked the end of

104. See Chapter 5 below.

105. On the question of development of nationalism in Africa and Asia, President Julius Nyerere of Tanzania writes that: "The nationalism of the twentieth century is the African and Asian variant of the expression on the world-wide demand for independence; it is a first step, although a fundamentally important one, but in order that this independence may have significance for mankind, our nationalism must go beyond this triumph and find its expression in the struggle of the ordinary man through the world for equality and justice, for the nationalism of the twentieth century is not, and cannot be exclusive and isolationist. It is, and must be, both international and human", See R.A. Tuzmukhamedov, Organizatsiya Afrikanskogo Edinstva, p.17 (Moscow, 1970), citing Julius K. Nyerere, Freedom and Socialism - Uhuru na Ujamaa, (Dar Es Salaam, 1968); see also Peter C.W. Gutkind and Peter Waterman, African Social Studies - A Radical Reader, (London, Nairobi, Lusaka, 1977).

106. See U.N. Document A/9769 of September 27, 1974.



the Portuguese colonialism in Mozambique was concluded in Lusaka, Zambia.

An "Agreement concerning self-government and self-determination for the Sudan"<sup>107</sup> was signed between the United Kingdom and Egypt, in 1953. The Agreement provides in Article 1 that: "In order to enable the Sudanese people to exercise Self-Determination in a free and neutral atmosphere, a transitional period providing full Self-Government for the Sudanese shall begin on the day specified in Article 9 below".<sup>108</sup> The scope of this Agreement is to establish a transitional government which will govern the Sudan until attainment of full independence. The two Contracting Parties agreed that the Agreement would terminate when the newly established Sudanese Constituent Assembly had decided either to link the Sudan with Egypt in any form, or to gain complete independent status.

Like any modern nationalistic people, the Sudanese chose to become a complete independent nation. The single prevailing view of the Sudanese people, who had been aspiring to achieve self-determination from Britain, was to realise that nationalistic desire. But the position of Egypt was one of guarantor. It guaranteed the peaceful transition to majority rule in the Sudan by means of sharing the administrative power with Britain during the transitional period (Article 8 of the Independence

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107. See U.N. Treaty Series, Vol. 161, 1953, pp. 157-185. Egypt and United Kingdom of Great Britain and Northern Ireland: Agreement concerning self-government and self-determination for Sudan (with agreed minutes, exchange of letters and annexes), signed at Cairo, on 12 February; 1953.

108. Ibid., p. 158, Article 1.

Agreement). It is clear that the aim of Egypt is to assist the people of the Sudan to achieve their self-determination as provided for under the Agreement.

This chapter would be incomplete without a mention of the O.A.U.<sup>109</sup> decisions and efforts relating to the development of self-determination. One of the principles inserted in the O.A.U. Charter stipulates that the Member States declare their adherence to absolute dedication to the total emancipation of the African territories which are still dependent (Article III(6)). With the aim of implementing self-determination in those territories which still aspire to become independent, the O.A.U. has worked very closely with the peoples in the non-self-governing African territories. In order to put into effect all its resolutions concerning the non-self-governing countries, the O.A.U. created a specialised committee provided for by Article XX of the Charter. The O.A.U. Liberation Committee is charged with duties to co-ordinate information between the O.A.U. and the liberation movements; and to administer the O.A.U. material and other assistance to the liberation movements.

The Liberation Committee prepares reports which are presented to the Heads of State and Government for discussion at their annual or special meetings. In 1964, the First Assembly of the Heads of State and

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109. O.A.U. Legal provisions and efforts regarding self-determination are also discussed in Chapter 2 below.



Government adopted resolutions on the basis of a "Report of the Committee of Liberation".<sup>110</sup> In those resolutions the O.A.U. reaffirms its will to continue by all means the intensification of the struggle for the independence of the territories under foreign domination. It decided that the budget for the Special Liberation Fund for the year 1964 was to be £800,000.

It is apparent that the aims of the O.A.U. to promote the liberation of non-self-governing African territories are totally within the realm of the rule of international law. This is so because the O.A.U. considers the presence of foreign dominating governments in Africa to be a violation of international law and a threat to international peace and security. Moreover, the O.A.U. is acting in conformity with the principles laid down in the Charter of the United Nations (i.e. as provided for under Article 52 of the U.N. Charter).

Having examined the legal evolution of self-determination, and demonstrated how the principle was exercised by African Peoples and Nations, the following inferences may be drawn:-

1) Self-determination emanated in the era of industrial revolutions (18th Century) in Western Europe and North America. At that time the idea was formulated as the principle of nationality, which acquired recognition as a principle of national law.

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110. See Ian Brownlie, Basic Documents on African Affairs p.372 (Oxford, 1971). See also O.A.U. resolutions of Heads of State and Government, and reports of the O.A.U. Liberation Committee, in the concerned O.A.U. Official publications; C. Legum, Pan-Africanism: A Short Political Guide, (N.Y. 1965); Id., Africa: A Handbook, (London, 1967).

- 2) Self-determination gained its international legal status during the League of Nations era, albeit in a limited way. During that period, self-determination was implicit in the League of Nations Mandate System. It was through States practice and the practice of the League of Nations, (especially its interpretation of Article 22 of the Covenant) that self-determination was transformed into its practical and legal meaning.
- 3) Classical international law did not provide for the promotion of self-determination for the peoples and nations of Africa in general, but some of them exercised it through the League of Nations Mandate System.
- 4) Whatever limitations it may have had, the Mandate System laid down a foundation upon which further evolved self-determination.
- 5) It is during the United Nations era that the actual transformation of the "idea of self-determination" into a principle and norm of contemporary international law has taken place. In the U.N. period, the principle of self-determination has become a legal right, which may be exercised by all peoples and nations, (including African peoples and nations).
- 6) Some African countries have embedded the principle of self-determination in their national constitutions. This, and the inclusion of self-determination into the Charter of the U.N., and indeed into other instruments



with an international legal character, brings us to the conclusion that self-determination (can no longer be considered to be a moral or political value) is now a legal norm, recognised both by national and international law.

7) It has been shown that individuals exercise self-determination both under national and international law, This proposition is opposed to the orthodoxy that only peoples and nations have a right to self-determination.

8) The view that once a country has attained political independence, none of its parts has a right to self-determination (or secession) is supported by both national and international African law. It is evident that African States desire to protect and preserve the newly gained independence, hence their adherence to that viewpoint.

9) Self-determination provisions are also found in some Independence Agreements between the metropolitan states and Liberation Movements. Essentially, this has contributed to the promotion of self-determination in Africa.

10) The O.A.U. has made a significant contribution towards the realisation of the right of self-determination by African peoples. Its Charter contains one of the most fundamental principles of the Organization - the principle of absolute dedication to the emancipation of the African territories which are still dependent. In practice, this principle has been implemented by the O.A.U. Liberation Committee which transmits O.A.U. assistance to the Liberation Movements of Africa.

## CHAPTER 2

### ECONOMIC SOVEREIGNTY AND UTILIZATION OF NATURAL RESOURCES

#### Section A. Legal concept of economic sovereignty

The nation has a right to develop. Every State has the sovereign and inalienable right to choose its economic system as well as its political, social, and cultural system in accordance with the will of its peoples, without outside interference, coercion or threat in any form whatsoever.<sup>1</sup>

The problem directly concerned with the financing of the economic development of underdeveloped countries was free of exploitation of their own wealth. Foreign financing in the form of aids, loans or private investment was certainly a valuable and indeed an essential factor in the development of underdeveloped countries but it was not the ideal solution. The ideal for an underdeveloped country was to attain economic independence, to dispose freely of its own resources and to obtain foreign exchange by selling its products to buyers of its own choice.<sup>2</sup>

Transfer of Wealth from rich to poor nations ...  
In one World as in one State, when I am rich because you are poor and I am poor because you are rich, the transfer of wealth from the rich to the poor is a matter of right; it is not an appropriate matter of charity.<sup>3</sup>

#### 1. Introduction

Before entering on an exposition of the contents of the present chapter, it is essential to delimit certain concepts connected with the exercise of economic sovereignty. But first it is necessary to explain the meaning of the term economic sovereignty or economic self-determination.

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1. See U.N. General Assembly resolution 3281 (XXIX) of 12 December 1974: "The Charter of Economic Rights and Duties of States", in U.N. Chronicle, Vol. XII No.1 1 January 1975, p.108; International Legal Materials (I.L.M.), Vol. 14, (1975), p.251.
  2. See Jacob Vinor, Studies in the Theory of International Trade, (London, 1955), pp. 439-440.
  3. See Julius K. Nyerere, "The Challenge: Dialogue or Confrontation", in International Development Review, January, 1976, (London).



One cannot understand what is meant by economic sovereignty without first understanding the meaning of the term sovereignty. While the doctrine of sovereignty has depicted developments within a state, its greatest influence has been in the relationship between states. In national law, sovereignty means the supreme authority in an independent political society.<sup>4</sup> In the legal or political sense, sovereignty signifies one of two issues: omnipotence, i.e. supremacy over others, or independence, i.e. freedom from control by others.

"Both the Permanent Court of Arbitration and the World Court have provided definitions which fully explain the meaning and legal significance of the principle of sovereignty or independence in international law.<sup>5</sup> In the Island of Palmas case award (1928), "sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."<sup>6</sup> A further

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4. See P.G. Osborn, A Concise Law Dictionary, Fifth Ed. (London, 1964) p.297.

5. See G. Schwarzenberger, International Law: International Law as Applied by International Courts and Tribunals, 3rd Ed., (London, 1957) p.115.

6. See Island of Palmas case (1928), 2.R.I.A.A., pp. 829; 838.

elucidation is provided by the Permanent Court of International Justice in its Advisory Opinion on the Austro-German Customs Union case (1931) in which the Court held that:

the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is viable, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.<sup>7</sup>

The latter definition covers the point on the indivisibility of political and economic independence of States.

As one of the most fundamental principles of international law, sovereignty implies a state's territorial supremacy and independence in international affairs.<sup>8</sup> However sovereignty belongs to the state and not to state power. The meaning of state power being - a system of state organs which together exercise the internal and external functions of the state.

With the coming into being of national (liberation) movements, sovereignty ceased to be only a state feature,

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7. See P.C.I.J. Reports 1931, Series A./B.41, "Customs Regime Between Germany and Austria (Protocol of March 9th 1931), Advisory Opinion of September 5th 1931", (Leyden, 1931), p. 45.

8. See N.A. Ushakov "International Law and Sovereignty", in G.I. Tunkin, Contemporary International Law, (Moscow 1969), p.97; G. Schwarzenberger, International Law and Order, (London, 1971), pp.57-84, Id., A Manual of International Law, Sixth Edition, (London, 1976), pp. 51-4; Benton, "Sovereignty and International Law", in Encyclopaedia Britannica, Vol.21, pp.100-101.



it also became a national feature.<sup>9</sup> Currently, national and state sovereignty are closely linked categories.

Sic, in relation to our topic of discussion, economic sovereignty means State sovereignty over the running of its economic affairs. The state is supreme and independent in conducting its economic affairs. Just as sovereignty is not absolute, but has certain limitations imposed upon by both national and international law, so too is economic sovereignty limited. Economic sovereignty is governed or regulated by rules of International Economic Law - which is a branch of Public International Law concerned with the ownership and exploitation of natural resources; the production and distribution of goods; currency and finance; related services as well as the status and organisation of those dealing therewith.<sup>10</sup> Albeit, every state has the sovereign and inalienable right<sup>11</sup> to exercise its economic independence and utilise its natural resources within the reins of international economic law, for such economic independence to be practicable and meaningful, the state needs co-operation of other subjects of international law.

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9. See C.N. Okeke, Controversial subjects of contemporary international law, (Rotterdam University Press, 1974).
10. See Schwarzenberger, A Manual of International Law, p.87.
11. See U.N. Charter of Economic Rights and Duties of States, (Article 1) op.cit.

Hence, for the purpose of reaching the objective for the establishment of a minimum standard of living for all peoples and nations, the exercise of economic sovereignty and the issues relating to utilisation of natural resources are the concerns for all mankind. Dr. Julius Nyerere writes that the major objective of international policies should be the establishment of a minimum standard of living for all peoples.<sup>12</sup> This will involve its converse, a ceiling on wealth for individuals and nations. In the ensuing discussions it will be demonstrated how the African peoples and nations have made it their primary concern to facilitate the establishment of the minimum standard of living throughout the whole African Continent as well as in their own territories. For them to succeed in achieving this objective, the African States must co-ordinate their economic policies. Already, work has begun in that direction. One may say that economic sovereignty and utilisation of natural resources has been under discussion in individual African countries as well as in the Organisation for African Unity (O.A.U.).<sup>13</sup> It is one

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12. On the transfer of wealth, Nyerere goes on to state that "the fact that in a nation State there is a Government which arranges this transfer of wealth, but that in the world there is no equivalent authority to do this work, makes a difference as to how the transfer should be effected, but does not make any difference as to the requirement that the transfer be made", see International Development Review, January, (London 1976), op. cit.

13. See Denis Taylor, "O.A.U. calls for Third World Links", in The Times, April 29, 1980, "The second phase of Africa's struggle for freedom had now begun, President Shehu Shagari of Nigeria told the Organisation of African Unity's first economic summit, which opened here today. All previous meetings at this level had concentrated on political issues, but Shagari told his fellow heads of state that without economic power, political independence was meaningless", p.9.



of the purposes of the O.A.U. as mentioned in its Charter Article 2 (b) that Member States co-ordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa. The African countries have formed regional economic groupings, e.g. Economic Community of West African States (ECOWAS); East African Community (EAC), (now defunct). Recently there has been a development towards an overall co-ordination of international development and planning. A good example is the agricultural development through multilateral co-operation and trade expansion which is a possibility for Dahomey, Niger and Nigeria. All these efforts and measures taken to establish a co-ordinated network of economic activities is necessitated by the need and desire of African States to eradicate the poverty which is found in every African country. This extirpation of poverty would no doubt bring economic prosperity to the continent.

One of the topical questions which is being discussed in various quarters in both the developing and developed countries is which methods should be adopted to achieve economic prosperity in developing countries. It has been urged in some of these quarters that one of the ways to eliminate poverty in developing countries is to grant them different kinds of economic aid. This aid would enable these countries to overcome their economic problems.

This approach is repudiated by Dr. Nyerere who takes the view that foreign aid is by its nature temporary and unreliable and must not become the basis of national development. A poor nation cannot be independent if it depends on external help. Foreign aid, he argues, should be used only for major projects, such as the Tanzania-Zambia railway and not for relatively simple schemes in which local materials and capital can be used. "Loans and grants from foreign countries and international aid agencies can become an established part of economic planning, with the result that the long-term aim of self reliance begins to fade away. In short, aid becomes a way of life".<sup>14</sup>

On the utilisation of natural resources, Nyerere speaks of a nation State having a Government that arranges the transfer of wealth, and he advocates the establishment of a very firm international economic law; rules and regulations which must govern the distribution of the world's wealth and natural resources; the utilisation of natural resources in all nations, including African states. He also argues for the establishment of international institutions that arrange the transfer of wealth and the use of natural resources.

In relation to the use of natural resources particularly when their exploitation involves foreign elements, the legal connotation of economic sovereignty involves on the one hand the state jurisdiction and

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14. See Nicholas Ashford, Third World Report "Dr. Nyerere's prescription to combat aid addiction". The Times, April 20, 1977, p.7.



some degree of international regulation on the other.<sup>15</sup>  
 This shows us that both national and international economic laws must govern the utilisation of natural resources for the promotion of economic independence.

Since most of the African States are incapable of supporting their programmes for economic development, there is a need for co-ordination of the aid which they receive and the utilisation of natural resources by the African recipient countries. Through the O.A.U. the African States have made significant efforts to harmonise their actions with regard to international institutions which are involved in assisting advance economic growth, e.g. International Bank for Reconstruction and development (I.B.R.D.), etc.

This prefatorial statement would be incomplete without a brief mention of the major legal methods employed to regulate the exercise of economic self-determination. These include, independence agreements provisions, constitutional economic provisions; investment law provisions; mining law provisions; and agricultural legal provisions.

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15. D.G. Clarke, in his work on Foreign Companies and International Investment in Zimbabwe, (Gwelo, Rhodesia 1980) on page 36 observed that: "Moreover, external investors are for the most part little subject to the domestic political and social progress. They are, therefore, individually or collectively able to make important decisions - consciously or otherwise - which have little or no bearing on the short- or long-term needs of the economy. Indeed, the domestic economy may for them have an abstract quality, a distant reality to be considered if and when specific events bear upon the return flow of interest, dividends or profits and of course, the proper growth and management of corporate assets. In one sense, the external corporate sector represents a "hidden constituency" without vote or formal presence but having nonetheless no inconsiderable influence on political, social and economic conditions."

Independence agreements lay down the foundation of the future legal regulation of foreign investment operations in an African country following its attainment of political independence. These provisions are designed to attract and assure the foreign investor having some doubts about the safety of his investment in the African country concerned. Whether the future economic policies of a country adhere to the promises in the independence agreements is a different matter. Examination of other related legal controls normally reveal the problems raised by the unfulfilled promises in the independence agreements provisions.

Since national constitution is a basic law of a given country, constitutional economic provisions of African States form the basic legal method of controlling the use of natural wealth and resources, including the conduct of other economic activities involving foreign elements. Constitutional provisions are some kind of a guideline because when economic provisions in other economic oriented branches of law are evolved, the former are used as fundamental laws guiding the policy-makers and the legislature.

Investment laws are of great importance as a method of control in a developing country where the majority and major investments are made by foreigners. These laws inumerate, classify and define pioneering or established and approved industries.



Mining and Agriculture are the key economic sectors of most African States. Since their production sectors are only beginning to take shape, these countries are heavily dependent on mining and agriculture for their external earnings. Failure by an African State to promote effective legal control in those two economic sectors leads to the slowing down in economic development of that country. Hence the inclusion of mining and agricultural legal provisions in this chapter is imperative. In summation, it is found useful to enumerate the most salient legal points. In the light of our analysis, the following emerge as the major points:-

- 1) Every State has a legal right to economic self-determination. This means the right of decision in all matters economic, financial, etc.;
- 2) State sovereignty - is the continued existence of a State within its frontiers as a separate entity with sole right of decision in all economic, political, social and cultural matters;
- 3) For economic independence to be practical and meaningful, every State needs the co-operation of other subjects of international law;
- 4) While foreign financing of economic development in developing States is necessary, the ideal situation for any developing State is to attain economic independence, to dispose freely of its own resources and to obtain foreign exchange by selling its products to buyers of its own choice;

- 5) The transfer of wealth is a matter of reciprocal necessity in international relations, and to effect that transfer, international economic institutions are to be established;
- 6) It is absolutely essential to have the transfer of natural wealth and resources and to improve the conditions under which the transfer is conducted and effected;
- 7) African States have employed certain major legal instruments to regulate the exercise of their economic self-determination;
- 8) Both national and international economic laws are used to promote economic independence in African States.

## 2. Economic Sovereignty

Economic self-determination concerns the right of every State to freely exercise permanent sovereignty. This includes possession, use and disposal, of all its wealth, natural resources and economic activities. In order to exercise that right a State takes measures to regulate all economic activities conducted within its territory. This is a legitimate exercise of State sovereignty. Every country seeks to protect its own economy. Moreover, economic dependence is now often viewed as neo-colonialism,<sup>16</sup> and in a world where there is a highly inequitable distribution of wealth and

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16. See H.W. Singer, "A New International Economic Order", in The Journal of Modern African Studies, Vol.16, (London 1978), pp.541-548; P.C.I.J. Reports 1931, Series A./B.41, Austro-German Customs Union case (1931), pp.47-48; Bratton Michael, "Structural transformation in Zimbabwe: Comparative Notes from the Neo Colonialism of Kenya", in The Journal of Modern African Studies, Vol.5, No.4, (London 1977), pp.591-611.



power between States, such a view can be described as a fact of life in international economic relations.

The concept of economic self-determination is a recent phenomenon in the development of contemporary international law. Classical international law did not define economic sovereignty in the way the concept is described in present international law. Moreover, classical international law did not provide for the regulation of the use of natural resources in the way present day international law is attempting to regulate them. In classical international law the disposition of resources was assumed to follow the delimitation of sovereignty in terms of petty quarrels between States. "Access to resources was a question managed within the legal categories of acquisition of territory the making of agreements, the concept of the freedom of the seas, and the doctrines of intervention, ..... In classical international law resources had no place".<sup>17</sup>

In order to give a substantial and comprehensive legal analysis for clear understanding of the meaning of economic self-determination, it is essential and of vital importance to examine the provisions of such legal instruments as: United Nations Charter; U.N. General Assembly resolutions on permanent sovereignty over natural resources; International Covenant on Economic, Social and Cultural Rights; U.N. General Assembly Declaration on the Establishment of a New International Economic Order; and the Charter of Economic Rights and

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17. See Ian Brownlie, "Legal Status of Natural Resources in International Law: (some aspects)", in Recueil des Cours, 1979, Vol. 162, p.253, (The Netherlands, 1980).

## Duties of States.

Although the Charter of the United Nations does not directly mention the words economic self-determination or economic sovereignty, it provides in Article 55, that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) higher standards of living, full employment and conditions of economic and social progress and development
- (b) solutions of international economic, social, health and related problems; and international cultural and educational co-operation; and
- (c) universal respect for and observation of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>18</sup>

According to Article 2 (1) of the U.N. Charter, the Organisation is based on the principle of the sovereign equality of all its Members. And as Ian Brownlie observes: "the concept of permanent sovereignty over natural resources has its historical origins in the principle of self-determination."<sup>19</sup> Thus, it may here be said that the U.N. position adopted in Article 55 and 2(1) were taken with the scope and desire to create conditions of stability and well-being, which

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18. See U.N. Charter Article 55; H.F. Van Panhuys, International Organization and Integration: A Collection of the Texts of Documents relating to the United Nations, its Related Agencies and Regional International Organization, (Leyden 1968), pp. 36-37.

19. See Brownlie, "Legal status of natural resources in international law", op.cit., p.255; id., Grotius Society Papers, 1978, pp.90-99; id., Principles of Public International Law, 3rd Ed. (London, 1979) pp.593-596.



would necessitate the promotion of peace and friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples. In the United Nations Charter there are provisions regarding questions of international economic and social co-operation which are embodied in Chapter IX, while Chapter X entitled "The Economic and Social Council", contain provisions concerning the responsibility for the discharge of the U.N. functions on the promotion of economic development of the Member States. It becomes clear here that within the framework of the Charter and most precisely, in the light of Articles 2 (1), 55, and 56, the principle of sovereignty and that of self-determination may be linked together, with the aim to reveal the legal conceptual content of economic self-determination. However, it is being noted that lack of precise provisions in the United Nations Charter stipulating in concrete terms the economic rights and duties of States may be described as one of the weaknesses of the Charter. It may equally be noted that at the time the Charter was adopted, the question of economic sovereignty was not yet perceived in the manner it is understood currently. Further, it must be noted that international economic law relating to natural resources was, before the second world war, at best in its infancy. As international economic law was not known before then, it acquired its scope and depth as States became more involved with

each other economically and created a variety of economic institutions and agreements to regulate and to promote increased trade, investment, monetary stability and other economic activities. The absence of international economic law during the formulation of the provisions of the U.N. Charter at the end of World War II, contributed to its silence on the question of economic sovereignty.

Despite the silence of the U.N. Charter on the question of economic self-determination, the U.N. General Assembly attempting to implement the provisions of the Charter on economic matters, especially those of Chapters IX and X, has adopted a number of important and substantial resolutions concerning international economic development and the improvement of international trade terms between States. Some of these resolutions concern the concept of permanent sovereignty over natural resources.

The concept of economic self-determination was first supported by the U.N. General Assembly resolution 626 (VII) of 21 December, 1952.<sup>20</sup> The resolution

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20. Since 1952 a series of developments within the framework of the United Nations has prominently focused on the control of and access to natural resources as such. Hence the adoption by the General Assembly of Resolutions: 626 (VII) of 21 December, 1952, "Right to exploit freely natural wealth and resources"; 1803 (XVII) of December 1962, "Permanent Sovereignty over Natural Resources"; 3171 (XXVIII) of 17 December 1973. This latter resolution strongly affirmed the inalienable right of states to permanent sovereignty over natural resources and supported the efforts of developing countries. Prior to 1952, the resources themselves did not directly appear as the formal medium through which disputes and conflicts between States were expressed. The territorial possession of important natural resources in itself did not confer power on States. The operation of the principle of .../



reads:

The General Assembly,  
Bearing in mind the need for encouraging the  
under-developed countries in the proper use  
and exploitation of their natural wealth and  
resources,

Considering that the economic development  
of the under-developed countries is one of  
the fundamental requisites for the strength-  
ening of universal peace,

Remembering that the right of peoples  
freely to use and exploit their natural  
wealth and resources is inherent in their  
sovereignty and is in accordance with the  
Purposes and Principles of the Charter of  
the United Nations,

1. Recommends all Member States, in the  
exercise of their right to use and exploit  
their natural wealth and resources wherever  
deemed freely desirable by them for their  
own progress and economic development, to  
have due regard, consistently with their  
sovereignty to the need for maintaining

20. continued ....

consent and the doctrine of alienability and the  
"open-door" could, as it often did, result in the  
transference of ownership and control of major  
natural resources into the hands of foreign inter-  
ests. During the nineteenth-century, the legal  
politics of Latin American countries had been  
characterised by the attempt to limit foreign  
control of national resources by contractual  
means. This was done by using a proviso called  
the Calvo Clause. According to the "Calvo Clause",  
the alien agrees to seek the diplomatic protection <sup>not ?</sup>  
of his own State and submit matters arising from  
the concession agreement to the jurisdiction of  
the host State. In this situation the tensions  
created by the desire of host States to exercise  
control over foreign owned sectors of the national  
economy were expressed in the categories of  
expropriation and the law relating to treatment of  
foreigners. In legal terms the problem was supposed  
to be resolved by means of invoking the principle  
of compensation; which means, the right of the  
sovereign State to expropriate the foreign-owned  
assets was recognised but only on the condition  
that prompt, adequate and effective compensation  
was paid by the States taking such measures. For  
further reference on the use of the Calvo Clause,  
see Brownlie, Principles of Public International  
Law, 3rd Ed., op.cit., pp.546-547; A. Freeman, The  
International Responsibility of States for Denial  
of Justice, ch.XVI, (1938); id., "Recent Aspects  
of the Calvo Doctrine and the Challenge to Inter-  
national Law", in The A.J.I.L., Vol. 40, (1946),  
pp. 121-125; Hershey, "The Calvo and Drago Doctrines",  
in The A.J.I.L., Vol. I, (1907), p.26.



the flow of capital in conditions of security, mutual confidence and economic co-operation among nations;

2. Further recommends all Member States to refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources.<sup>21</sup>

The foregoing resolution gives the clear impression that the right of peoples to freely use and exploit their natural resources is inherent in their sovereignty and that the exercise of that right is in accordance with the purposes and principles of the Charter of the United Nations. The resolution recommends that in the exercise of their economic sovereignty, U.N. Member States have to take due regard of the need for maintaining the flow of capital in conditions favourable to economic co-operation among nations. It further recommends the Members of the United Nations to refrain from acts that will impede the exercise of self-determination. In this resolution, the General Assembly considers that the economic development of developing countries<sup>22</sup> is

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21. See U.N. General Assembly Resolution 626 (VII) of 21 December, 1952.

22. In 1954 the General Assembly requested the Commission on Human Rights to make recommendations concerning the permanent sovereignty of peoples over their "natural wealth and resources, having due regard to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of underdeveloped countries", see Resolution 837 (IX) of 14 December 1954. In resolution 1314 (XIII) of 17 December 1958 the General Assembly noted that the right of peoples and nations to self-determination includes permanent sovereignty over their natural wealth and resources and decided to establish a Commission on Permanent Sovereignty over Natural Resources. The Commission was mandated to conduct a full survey of the Status of this basic element of the right to self-determination.



one of the fundamental requisites for the strengthening of international peace and security, and hence it bears in mind the need to encourage these countries to use properly and exploit their natural wealth and resources.

Another legal instrument from which the concept of economic sovereignty has emanated is the General Assembly resolution 1803 (XVII) of 14 December, 1962, entitled "Permanent Sovereignty over natural resources". Ian Brownlie writes that "This resolution remains an important part of the materials to be taken into account in any appreciation of contemporary principles, and it prefigures in the resolutions formulating the New International Economic Order and the Charter of Economic Rights and Duties of States."<sup>23</sup> Certainly, if we are to rationally evaluate the legal concept and content of the principle of economic self-determination, it is of paramount importance to read the full text of this General Assembly resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources:

The General Assembly,

Recalling its resolutions 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1952.

Bearing in mind its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening and decided

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23. See Brownlie, "Legal Status of natural resources in international law". *op.cit.*, p.256; F.C. Bergsten, Towards a New International Economic Order: Selected Papers of C.F.B. 1972-1974, (Lexington Massachusetts, 1975); K.S. Banerjee, "The Concept of Permanent Sovereignty Over Natural Resources: An Analysis", in I.J.I.L., Vol. 8, 1968, pp. 515.

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further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international co-operation in the economic development of developing countries.

Bearing in mind its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected.

Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States.

Considering that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule.

Noting that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission.

Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination.

Considering the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connection.

Attaching particular importance to the question of promoting the economic development of developing countries and securing their economic independence.



Noting that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforce their economic independence.

Desiring that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly that of the developing countries.

# I

Declares that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to authorisation, restriction or prohibition of such activities.
3. In cases where authorisation is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any

case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.
6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.
7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.
8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

## II

Welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly.

## III

Requests the Secretary-General to continue the study of the various aspects of permanent



sovereignty over natural resources, taking into account the desire of Member States to ensure the promotion of their sovereign rights while encouraging international co-operation in the field of economic development, and to report to the Economic and Social Council and to the General Assembly, if possible at its eighteenth session.<sup>24</sup>

The above cited resolution covers a wide variety of issues closely related to and directly concerned with the exercise of economic sovereignty and the use of natural resources. An objective and constructive analysis of the resolution leads to the conclusion that the right to exercise sovereignty over natural resources is not attributed to States alone, but also to Peoples and Nations. Thus the use of the terms "peoples and nations" in paragraph (1) may be interpreted to mean peoples and nations who have not yet attained political independence. The resolution also embraces the most sensitive question of foreign participation in the exploitation and utilisation of the natural resources belonging to another State, People or Nation. It stipulates that violation of the rights of peoples and nations to exercise sovereignty over their natural wealth and resources is contrary to the spirit and

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24. See General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent Sovereignty over Natural Resources". The resolution is reproduced by Ian Brownlie in Basic Documents in International Law, op.cit., pp. 140-143; id., in Recueil des Cours 1979, Vol. 162, pp. 256-259; in U.N. Document ST/HR/1/Rev. 1, Sales No. E.78, XIV.2, Human Rights - A Compilation of International Instruments, pp. 21-22, loc. cit., n.93, Ch.1 above; P. Connelly and R. Perlman, The Politics of Scarcity, Resources Conflicts in International Relations, (Oxford, 1975); S. Oscar, Sharing the World's Resources, (N.Y. 1977); N.J. Hyde, "Permanent Sovereignty Over Natural Wealth and Resources", in American Journal of International Law, Vol. 50, 1956, pp. 854-867.

principles of the Charter of the United Nations.

It further provides that violation of the exercises of economic sovereignty hinders the development of international co-operation and the maintenance of peace. One of the most important features of this resolution is that it attaches special importance to the question of attainment and promotion of economic sovereignty by the developing countries. The resolution expresses the view that nothing but the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources can reinforce their economic independence.<sup>25</sup>

The next legal instruments to be examined and analysed are the International Covenants on Human Rights.<sup>26</sup> These two documents contain an identical Article (1) which refers to both political and economic legal rights of all peoples and nations to exercise political and economic self-determination. The International Covenants on Human Rights have now been in force<sup>27</sup> since the first quarter of 1976. This Article (1) provides:

1. All peoples have the right of self-determination. By virtue of that right

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25. On the legal significance of resolution 1803 (XVII) see Brownlie, "Legal status of natural resources in international law", op.cit., pp. 260-262.

26. The International Covenants on Human Rights were adopted by General Assembly resolution 2200 (XXI) of 16 December 1966; the full texts are reproduced in Brownlie, Basic Documents in International Law, op.cit., pp. 150-181.

27. See N.74 in Chapter 1 above.



they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources, without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a peoples be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>28</sup>

The right of self-determination provided for under paragraph (1) may be exercised by all peoples freely deciding on the form of a political and economic system under which they choose to live. This means the people have a right to freely pursue either a socialist or capitalist system.<sup>29</sup> This peoples' right to choose their own political system is quite a legitimate one, hence it is provided under paragraph (1) of the Article that "By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

Paragraph (2) of the above-mentioned identical Article (1) of the Covenants on Human Rights clearly

28. See Article (1) of the International Covenant on Human Rights loc. cit. above.

29. See General Assembly Resolution 3171 (XXVIII) "Permanent Sovereignty over Natural Resources" which provides in the preamble that the General Assembly reaffirms the inviolable principle that every country has the right to adopt the economic

provides that all peoples and nations may dispose of their natural wealth and resources without prejudice to any international obligations emanating from international economic co-operation. Such co-operation is deemed to be based on the principle of mutual benefit, and on international law. Here we are being reminded that the guiding principle is that of mutual benefit, with the benefit being derived from participation in international economic co-operation. What may be deduced from that paragraph (2) is that it is the right of all peoples and nations within the boundaries of international law, to freely take any measures facilitating the exercise of economic sovereignty and the utilisations of their natural wealth and resources. Provisions of that paragraph (2) gives the impression that a State may even take measures of nationalisation of property (including foreign property), should that be in the interest of public utility, and national interest. As the last sentence of the paragraph states, "In no case may a peoples be deprived of its own means of subsistence", this may be interpreted to mean that the State may nationalise any property or

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29. Continued.....

and social system which it deems most favourable to its development; General Assembly Resolution 3201 (S-VII) of 1 May 1974, "Declaration on the Establishment of a New International Economic Order", paragraph 4 (d). The right of a people to freely choose its economic system is an emerging principle of customary international law. Hence its expression in that resolution as one of the principles upon whose respect the New International Economic Order shall be founded. This paragraph 4 (d) stipulates that every country has the right to adopt the economic and social system that it deems to be the most appropriate for its own development and that such a country should not be subjected to discrimination of any kind as a result.



indeed take any other measures which effectively puts it in control of economic development of its own means of subsistence. Further details on the question of nationalisation will be discussed below where instruments pertaining to this question are examined.

Under the provisions of paragraph (3) of the Article (1) named above, States that are parties to the International Covenants on Human Rights are urged to promote and respect the right of self-determination, in conformity with the provisions of the United Nations Charter. Even States that have the responsibility for the administration of Non-Self-Governing and Trust Territories are also urged to promote and respect the right of self-determination in accordance with international law.

Finally, it is observed that paragraphs (1) and (2) of Article 1 examined above, speak of the right of peoples and nations to exercise self-determination, while paragraph (3) of the same is devoted to the obligations of States. However, from a close analysis of that Article (1) of the International Covenants of Human rights, one derives the following points:

1. It is the States', Peoples' or Nations' right to exercise economic self-determination
2. When exercising that right, States, Peoples and Nations must adhere to the rules of international law.

One of the most important bases of economic relations between all subjects of international law is the Declaration

on the Establishment of a New International Economic Order.<sup>30</sup> This Declaration notes that the General Assembly convened a special session to study for the first time the problems of raw materials and development, and that the Assembly is devoted to the consideration of the most important economic problems facing the world community. Taking its action in compliance with the U.N. Charter, the Assembly had in mind the spirit, purposes and principles of the Charter to promote the economic advancement and social progress of all peoples.

The adoption of the Declaration on the New International Economic Order was triggered (in 1973-1974) by the demands for greater economic justice and the need to adjust economic disparity between the developing and developed nations.<sup>31</sup> This concern was generated in part by the decision of the oil producing and exporting nations to impose large increases in the price of oil and petroleum products. It was this issue which prompted the decision of the General Assembly to

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30. See paragraph 7 of the General Assembly Declaration on the Establishment of a New International Economic Order, resolution 3201 (S-VII), adopted without vote at the Sixth Special Session, 2229th plenary meeting May 1, 1974; R.C.A. White, "A New International Economic Order", in I.C.L.Q., Vol.25, 1975, pp.542-552; Brownlie, "Legal status of natural resources in international law", op.cit., p.262; Singer, "A New International Economic Order: Order versus disorder", op.cit., p.541; G.W. Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of States", in The International Lawyer, Vol.9, No.4, 1975, pp.585-591; G. Schwarzenberger, Economic World Order: A Basic Problem of International Economic Law, (Manchester, 1970).

31. See the Introduction to the Report of Secretary-General on the work of the United Nations, July, 16, 1973 - June 15, 1974, reproduced in U.N. Monthly Chronicle, Vol.II, August - September, 1974, pp.115-119.



express concern over the problems regarding the economic relations between nations, most especially problems of economic relations between developed and developing countries. Hence the convening of a special session by the General Assembly to study the problems. In fact, the Assembly proclaimed in the Declaration its determination to urgently work for the Establishment of a New International Economic Order. This need to urgently work on the establishment of a New International Economic Order, emphasises on the seriousness of the problems and the need to redress the economic inequality between the developed and developing countries.

However, it suffices to mention here that "A New International Economic Order"<sup>32</sup> was in fact in the making throughout since 1945. Apart from the adoption of the 1974 U.N. Declaration, in different ways and venues States have been evolving the concept of the New International Economic Order, and where-ever possible taking tangible steps towards its implementation through international organisations.

The Declaration on the Establishment of a New International Economic Order includes (in paragraph 4) the

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32. See A.G. Moss and H.N.M. Winton, A New International Economic Order: Selected Documents 1945-1975, (UNITAR, N.Y. 1975); G.W. Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of States", op.cit., pp.591-604, in The International Lawyer, Vol.9, 1975; S.K. Agrawala, "The Emerging International Economic Order", in Indian Journal of International Law, Vol.17, 1977 pp.261-81.

formulation of a set of 20 principles of international economic law. One of such principles being:

- (e) Full permanent sovereignty of every State over its natural resources and economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalisation or transfer of ownership to its nationals, this right being an exercise of full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of its inalienable right.<sup>33</sup>

Although it is difficult to decide to what extent, the Declaration in itself indicates any specific developments in customary international law,<sup>34</sup> the legal content of certain principles contained therein is self-evident, and their legal nature need not to be prima facie discarded without a thorough examination. Thus the legal content of the latter cited paragraph 4 (e) is self-explanatory in the sense that it provides in precise terms the right of States to exercise their economic self-determination, including the right to nationalise or transfer ownership of foreign property to its nationals. Apart from reiterating the inalienable right of States to the full exercise of national sovereignty over their natural resources, paragraph 4 (e) stresses the point that no State may be subject to economic, political or any other coercion in order to prevent it from freely exercising its right of economic sovereignty.

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33. See Paragraph 4 (e) Declaration on the Establishment of a New International Economic Order, op.cit.

34. See Brownlie, "Legal status of natural resources in international law", op.cit., p.263.



Paragraph 4 (f) of the Declaration stipulates that "All States, territories and peoples under foreign occupation, alien and colonial domination or apartheid have the right to restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those States, territories and peoples". This provision makes it clear that the States, Peoples and Nations whose natural resources have been exploited, exhausted and damaged have a right to restoration and to receive full compensation as payment for what they have lost during the period they have been under foreign occupation, alien and colonial domination or apartheid. This means that the newly independent States, e.g. of Africa, have a right to be paid compensation by their former colonial rulers for the exploitation and exhaustion of, and damage to, the natural resources of such African countries during the colonial period. Thus, compensation should be paid by the former administrative authorities to the colonial and other dominated peoples and nations. The inclusion of this provision in the Declaration on the Establishment of a New International Economic Order shows a turning point by the international community away from the former view that the so-called foreign owners of the property - the metroploitan States, their nationals, other aliens, should always be paid compensation by a newly independent State, in the event of it nationalising, or expropriating such property when it considers that property to be most

vital in the interest of its national economic development. This means that in addition to compensation for nationalisation, the U.N. Law now seeks restitution for the damage exploited natural resources. It is true, there are all sorts of arguments put forward by the former colonial powers against the idea of paying compensation to their former colonies, but whatever the weight of such arguments, it remains a fact in customary international law, that a new principle is emerging, namely, that countries attaining political independence from former metropolitan powers have a right to be paid compensation for the squandering of their national wealth and natural resources by those former metropolitan States during the colonial period. Whether the metropolitan States refuse to recognise this principle and adhere to its implementation, is a different matter altogether. However, so far there has not been a case where a developing country is challenging its former colonial master demanding payment of compensation in exercising the right, contained in paragraph 4 (f) of the declaration. It is only through state practice and maybe through the practice of the United Nations that this new principle may become law.

Finally, paragraph 4 (h) in the Declaration provides for the "right of the developing countries and peoples of territories under colonial and racial domination and foreign occupation to achieve their liberation and regain effective control over their natural resources and economic activities". Fixing of this right for new States and



Liberation Movements to achieve independence and regain control over their natural wealth and resources and economic activities is a new legal phenomenon in the dynamic process of development of the principle of economic self-determination.

The most salient legal instrument which forms the basis of the study of economic independence is the Charter of Economic Rights and Duties of States.<sup>35</sup> The Charter, which is contained in Resolution 3281 (XXIX), was adopted by the General Assembly on 12 December, 1974. The voting on the resolution was 120 in favour, 6 against and 10 abstentions. Desiring to promote their economic sovereignty through the use of international economic law, the developing countries "pushed through"<sup>36</sup> the adoption of that resolution. In fact, the majority of them voted in favour of it. The countries which voted against it were, Belgium, the United States, the United Kingdom, the Federal Republic of Germany, Denmark and Luxembourg.

The Charter though being welcome in developing countries, it is not generally accepted, particularly in some Western industrialised countries.<sup>37</sup> Interpretation

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35. For the Charter of Economic Rights and Duties of States, see *loc.cit.*, n.1 above.

36. See R.B. Lillich, "The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack", in The A.J.I.L. Vol.69, (1975), p.361. In this work, Lillich gives his comments on the Charter.

37. See E.J. Arechaga, "International Law in the past third of a Century", in Recueil des Cours, Vol.159, 1978, p. 302, (3) Criticisms of the Provisions of the Charter of Economic Rights and Duties of States.

of the legal content and nature of the entire Charter, or certain of its provisions vary.<sup>38</sup> However, Article 33 (2) clearly stipulates that: "In their interpretation and application, the provisions of the present Charter are interrelated and each provision should be construed in the context of other provisions". This means that, once one recognises the Charter as a legal instrument, one has equally acknowledged every other provision contained therein as having a legal character. The introductory section of Resolution 3281 (XXIX) must be examined as they indicate the legal nature of the Charter. Sic, the Preamble of the resolution provides as follows:

#### The General Assembly

Recalling that the United Nations conference on Trade and Development, in its resolution 45 (III) of 18 May, 1972, stressed the urgency "to establish generally accepted norms to govern international relations systematically" and recognised that "it is not feasible to establish a just order and a stable world as long as the Charter to protect the rights of all countries, and in particular the developing States, is not formulated".

Recalling further that in the same resolution it was decided to establish a Working Group of governmental representatives to draw up a draft Charter of Economic Rights and Duties of States, which the General Assembly, in its resolution 3037 (XXVII) of 19 December, 1972, decided should be composed of 40 Member States.

Noting that in its resolution 3082 (XXVIII) of 6 December 1973, it reaffirmed its conviction

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38. See Ibid., pp. 300-304; Lillich, "The diplomatic protection of Nationals Abroad:", op.cit., pp. 359-365; Brownlie, "Legal status of Natural Resources", op.cit., pp. 265-271.



of the urgent need to establish or improve norms of universal application for the development of international economic relations on a just and equitable basis and urged the Working Group on the Charter of Economic Rights and Duties of States to complete, as the first step, in the codification and development of the matter, the elaboration of a final draft Charter of Economic Rights and Duties of States, to be considered and approved by the General Assembly at its twenty-ninth session.

Bearing in mind the spirit and terms of its resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, containing the Declaration and the Programme of Action on the Establishment of a New International Economic Order, which underlined the vital importance of the Charter to be adopted by the General Assembly at its twenty-ninth session and stressed the fact that the Charter shall constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality, and inter-dependence of the developed and developing countries.

Having examined the report of the Working Group on the Charter of Economic Rights and Duties of States on its fourth session, transmitted to the General Assembly by the Trade and Development Board at its fourteenth session.

Expressing its appreciation to the Working Group on the Charter of Economic Rights and Duties of States which, as a result of the task performed in its four sessions held between February 1973 and June 1974, assembled the elements required for the completion and adoption of the Charter of Economic Rights and Duties of States at the twenty-ninth session of the General Assembly, as previously recommended.

Adopts and solemnly proclaims .... the Charter of Economic Rights and Duties of States .....39

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39. See General Assembly Resolution 3281 (XXIX); P.C. Rao, "Charter of Economic Rights and Duties of States", in I.J.I.L., Vol.15, No.3, 1975.

Although the above provisions do not expressly mention the word "legal" or make reference to international law as such, if one analyses them in a broad and constructive manner, their legal content can easily be seen. The wording of these provisions in itself, "does not positively exclude a legal character attaching to all or part of the Charter".<sup>40</sup> However, it is stated in the first paragraph that the General Assembly recalls that resolution 45 (III) of the U.N. Conference on Trade and Development, stressed the urgency to establish general accepted norms to govern international relations systematically and recognised that it is not feasible to establish a just order and a stable world as long as the Charter to protect the rights of all countries and in particular the developing States, is not formulated. It is also stated in the second paragraph that the General Assembly noted in its resolution 3082 (XXVIII) the reaffirmant of its conviction of the urgent need to establish or improve norms of universal application for the development of international economic relations on a just and equitable basis and urged the completion of the work on the Charter. It can be said that the expression, "to establish generally accepted norms to govern international relations systematically" mentioned in that first paragraph, could be interpreted as implying, the establishment of accepted norms of international law

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40. See Brownlie, "Legal status of Natural Resources", op. cit., p.266.



which governs international relations. Equally, the expression "to establish or improve norms of universal application for the development of international economic relations", could be interpreted as implying: the establishment or improvement of norms of international economic law. However, despite some of these ambiguities in the preamble of resolution 3281 (XXIX), the gist of the matter remains that through the practice of the United Nations, and through State practice, the principles and indeed, all other provisions laid down in it, systematically develop into principles or provisions of customary international law. It is through its implementation that the Charter, and indeed, all its other provisions are transformed into customary international law. According to Article 34 of the Charter, such implementation occurs in the following way:

An item on the Charter of Economic Rights and Duties shall be inscribed in the agenda of the General Assembly at its thirtieth session, and thereafter on the agenda of every fifth session. In this way a systematic and comprehensive consideration of the implementation of the Charter, covering both progress achieved and any improvements and additions which might be necessary, would be carried out and appropriate measures recommended. Such consideration should take into account the evolution of all the economic, social, legal and other factors related to the principles upon which the present Charter is based and on its purpose.<sup>41</sup>

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41. See Charter of Economic Rights and Duties of States, Article 34.

The Charter has a lengthy preamble stating the broad scope of the instrument and emphasising the need to establish a just and equitable international economic legal order. One paragraph in the Preamble declares that:

it is a fundamental purpose of this Charter to promote the establishment of the new international economic order, based on equality, sovereign equality, interdependence, common interest and co-operation.<sup>42</sup>

Hence it is desirous to contribute to the creation of conditions for the attainment of wider prosperity in all countries and to achieve higher standards of living for all peoples. This contribution will have effects on the concept of economic sovereignty, since the implementation of the theory should produce the actual attainment of prosperity and raising of standards of living for all and thereby result in the fulfilment of the concept of self-determination.

The heading of Chapter 1 of the Charter reads, "Fundamentals of international economic relations", and stipulates that "economic as well as political and other relations among States shall be governed, inter alia, by the following principles". The principles provided therein include "Equal rights and self-determination of peoples", "Sovereignty, territorial integrity and political independence of States", "Sovereign equality of all States", and "international co-operation for development". It is evident from these examples that the Charter includes principles

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<sup>42</sup>. See Ibid., Preamble, fourth paragraph.



closely related to the concept of economic sovereignty.

Article 1 of the Charter stipulates the following:

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its peoples. without outside interference, coercion or threat in any form whatsoever.

The principle advocated here is substantially identical to those legal principles contained in the United Nations Charter and in other General Assembly resolutions which have been analysed above in this subsection. It therefore, becomes apparent that the concept of economic sovereignty propounded in those other documents examined above in this subsection is also promoted in the Charter of Economic Rights and Duties of States.

By virtue of the right to exercise full permanent sovereignty over natural wealth and resources, paragraph (2) of Article 2 of the Charter provides that "Each State has the right

- (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
- (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and takes measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal

affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this sub-paragraph;

- (c) To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by the sovereign equality of States and in accordance with the principle of free choice of means.<sup>43</sup>

The significance of Article 2 paragraph 2 (a) is that it gives the State the right to formulate regulations and create laws that govern foreign investments. The State in whose territory, and under whose laws the foreign investment is established and operating, exercises full and exclusive legal control over such foreign investment. This legal control of foreign investments operating under the jurisdiction of the host State, is the exercise of the right of economic self-determination by that State. But it must be noted that when States exercise their economic sovereign rights, they are obliged under international law to take into account the rights of other States, including the rights of individual nationals of

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43. See Charter of Economic Rights and Duties of States, Article 2, op.cit. above; K. Kotzavov, The Theory of Nationalisation, (The Hague, 1964); R.B. Lillich, The Valuation of Nationalised Property in International Law, (Charlottesville, 1972); B.A. Wortley, Expropriation in Public International Law, (Cambridge, 1959).



other States who have investment interests in that particular host State. These individual rights are protected by international law, agreements between States, or its respective institutions dealing with economic matters, and the foreign investor.

As regards the legal control of multi-national corporations operating in the host State territory, and within the jurisdiction of that State Article 2 paragraph 2 (b) of the Charter clearly stipulates that measures to regulate and supervise the economic activities of such multi-national corporations shall be taken by the host State in accordance with its laws, regulations and rules. It is further provided in the same subparagraph that foreign multi-national corporations operating in the territory of the host State, shall not intervene in the internal affairs of that State. Thus this makes it clear that when a foreign multi-national corporation is operating economic activities in the host State, it should adhere to laws, rules and regulations in force in that host State. It must be noted here that the Charter is providing for use of national laws, regulations and rules to govern the activities and operations of multi-national corporations in the host State. Thus, a departure from the doctrine that only international law is employed to govern the said relationships.

Under Article 2 paragraph 2 (c) a State may nationalise, expropriate or transfer ownership of foreign

property, in which case the nationalising State should pay the owner of that property "appropriate compensation". But this subparagraph further stipulates that when a State is taking those measures of nationalisation or expropriation, it should do so taking into account its own national laws and regulations, and all other circumstances that the State considers pertinent. In the event where the question of compensation gives rise to a dispute between the foreign owner of the nationalised property and the nationalising State, this subparagraph (c) provides that such a dispute shall be settled under the domestic laws of the nationalising State and by its tribunals. To avoid this happening there must be an agreement on the settlement of investment disputes between the parties concerned. Such an agreement would normally indicate how the dispute should be settled.

It has been observed that Article 2 paragraph 2 (c) does not contain the provisions which were inserted in General Assembly resolution 1802 of 1962 which provided that in case of nationalisation or expropriation, the nationalising State must pay appropriate compensation "in accordance with rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law". The deviation from this principle was caused by the insistence of the developed countries in asserting that international customary law provided for payment of "adequate, prompt and effective compensation". This made the developing



countries to be concerned about the use of international law by the Western countries.<sup>44</sup> This means that the alleged customary rule of "immediate, adequate and effective" compensation has given way to the emerging principle that "appropriate compensation" must be paid by the nationalising State in accordance to its domestic laws.<sup>45</sup>

Having the right to economic self-determination, Article 7 of the Charter provides that:

Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilise and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually and collectively, to co-operate in order to eliminate obstacles that hinder such mobilisation and use

This above cited Article illustrates that, in the process of utilisation of natural wealth and resources, the State has the right to mobilise the resources taking into account the interests of its people who should benefit from the economic development. The State chooses without pressure from any other sovereign State or entity, the means and types of economic developmental projects that are needed to advance its economy and the well-being of its people. Other States have the duty to refrain from acts which would hinder

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44. See Arechaga, "International law in the past third of a century", op. cit., n.588.

45. See Brownlie, "Legal status of natural resources in international law", op.cit., 267.

the progressive mobilisation and utilisation of natural wealth and resources.

Article 3 of the Charter speaks of the "exploitation of natural resources shared by two or more countries", in which case "each State must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others". This means that sovereign States sharing natural resources, are duty bound to co-operate in the exploration of such resources on the basis of the principle of mutual and equitable benefit.

Still on the co-operation of sovereign States and the meaning of economic independence, Article 10 of the Charter provides the following:

All States are juridicially equal and, as equal members of the International Community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic financial and monetary problems, inter alia, through the appropriate international organisations in accordance with their existing and evolving rules, and to share equitably in the benefits resulting therefrom.

It goes without saying that the Charter contains, on one hand, articles stipulating the rights, and on the other hand, those prescribing the duties of States. Hence it should be noted here that Articles 1, 2, 3, 7 and 10 cited and examined above are all stipulating the rights of States in relation to the exercise of economic self-determination. Those Articles which are



dealt with below, prescribe the duties and obligations of States as regards the same right. This division between the articles laying down the rights of States and those stating their duties and obligations should enable us to grasp the apparent distinction between the rights and duties and obligations of States in this study of the meaning of economic sovereignty and utilisation of natural wealth and resources.

According to the principle of "international co-operation for development" States are required to co-operate with each other, and with international organisations in order to bring about and encourage economic development and utilisation of natural resources. To that end Article 11 of the Charter provides the following:

All States should co-operate to strengthen and continuously improve the efficiency of international organisations in implementing measures to stimulate the general economic progress of all countries, particularly of developing countries, and therefore should co-operate to adapt them, when appropriate, to the changing needs of international economic co-operation.

It is the duty of a State to co-operate with other States and to take, within this framework of co-operation, all measures to improve the efficiency of international economic organisations, so as to stimulate international economic development and prosperity. The implementation of this principle of "international co-operation for development", either through the United Nations, or State

practice would no doubt indicate the emergence of a new principle of customary international law.

In order to promote and advance the development of the concept of economic sovereignty universally, Article 16 of the Charter provides that:

1. It is the ... duty of all States, individually and collectively, to eliminate colonialism apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damage to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.
2. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.

Paragraph 1 of the above Article lays down the duty and obligation that a State or States should refrain from acts of any form of domination of other peoples and nations, as such an act would constitute a breach of the law of the United Nations. This breach of law would hinder the promotion of economic sovereignty and utilisation of natural wealth and resources of the dominated country. The same paragraph provides that States which practise the domination of other peoples and nations, are responsible for the payment of "full compensation" for the exploitation and depletion of, and damage to, the natural wealth and resources of those dominated nations and peoples. This stipulation regarding



compensation, reiterates paragraph 4 (f) in the Declaration on the Establishment of a New International Economic Order suggesting -that colonial and other dominating States should pay compensation to the colonised or dominated peoples or nations. Paragraph 2 of the same Article points out that a State has a duty and obligation to discourage the promotion of investments which would hamper the progress of liberation of a territory under occupation. This, again means that under the United Nations Law, it is illegal for a State to promote or encourage investments in a country occupied by force.<sup>46</sup>

Since economic sovereignty and utilisation of natural wealth and resources are interlinked with the question of assistance given to developing countries by the developed States and international organisations, Article 17 provides as follows:

International co-operation for development is the shared goal and common duty for all states. Every State should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.

This Article elaborates the principle of "international co-operation for development" contained in Chapter 1 of the Charter of Economic Rights and Duties of States.

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46. See I.C.J. Reports 1971, loc.cit., n.86, Ch.1 above.

One is again reminded that "the duty of States to co-operate with one another in accordance with the Charter" of the United Nations is a recognised principle of ".... International Law concerning Friendly Relations and Co-operation among States" ... declared in the General Assembly resolution 2625 (XXV) of 24 October 1970. It is evident that the co-operation advocated for under Article 17 of the Charter of Economic Rights and Duties of States is derived from resolution 2625 (XXV) and indeed from the Charter of the United Nations itself. Since international law has developed and continues to do so on the basis of co-operation among States, the responsibilities tacitly addressed to the developed countries under Article 17, to co-operate with the efforts of developing countries aiming at accelerating their economic development, can only be described as a direct response by the international community for the need to promote economic self-determination in developing countries. Hence implementation of international co-operation developmental programmes would result into crystallisation of the principle of international co-operation for development and its development into a norm of international law.<sup>47</sup>

After the examination and analysis of the legal instruments relating to the concept of economic self-determination, it becomes evident that it is now a well

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47. See H.H. Han, International Legislation by the United Nations: Legal Provisions, Practice and Prospects, (N.Y. 1971); J.L. Kunz, The Changing Law of Nations: Essays on International Law, (Ohio, 1968); H.L. Hart, Law in the Making, (Oxford, 1961); G.Herczech, General Principles of Law and the International Legal Order (Budapest 1969).



recognised fact in law, that by international law, and the law of the United Nations, the right of States, Nations and Peoples to determine their economic future is a legal right. It is not a mere moral value. It therefore follows that all States, Nations and Peoples have a legal duty (obligation) to observe the exercise of that right. To substantiate this view, it is imperative to reveal the legal nature of these instruments discussed above in this subsection, viz., the Charter of the United Nations; General Assembly Resolutions on permanent sovereignty over natural resources; International Covenant on Economic, Social and Cultural Rights; General Assembly Declaration on the Establishment of a New International Economic Order; and the Charter of Economic Rights and Duties of States.

"The question of the legal nature of Charters of international organisations is undoubtedly of great theoretical and practical interest. The Charters of international organisations are international treaties having certain peculiarities, treaties sui generis".<sup>48</sup> This means that as treaties of their own kind, the Charters of international organisations, such as the Charter of the United Nations, create permanent international entities which function on the basis of those

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48. See G.I. Tunkin, Theory of International Law, Translated by E. Butler, L.I., (London 1974), p.322, 325; Trans C. De Visscher, Theory and Reality in Public International Law, (London 1971); W.L.Tung, International Organizations Under the United Nations System, (N.Y. 1969); M.S. Korowicz, Introduction to International Law: Present Conceptions of International Law in Theory and Practice, (The Hague 1959).

charters. These charters define the rights and duties of States-parties thereof. They also define the purposes and functions of the organisation. It means that the Charter of the United Nations is a treaty with certain peculiarities. It defines rights and duties of the States parties to it, and it also defines the purposes and functions of the United Nations. As a treaty sui generis, and like any other such treaties, the Charter of the United Nations falls under certain provisions of the law of treaties:

In particular, the following provisions of the law of treaties are applicable to them: the conclusion and entry into force of multilateral treaties, except for certain provisions relating to reservations; the invalidity of treaties; the amendment and interpretation of treaties; the operation of international treaties; and above all the basic principle of this section of the law of treaties - pacta sunt servanda; the significance of treaties for the third states; etc.<sup>49</sup>

It is essential to remember that treaties create legal rights and obligations for the parties. By virtue of the United Nations Charter being a treaty,<sup>50</sup> which is in force,<sup>51</sup> it is an instrument legally binding upon the U.N. Member States.

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49. See Tunkin, Theory of International Law, op.cit., p.325.

50. On the nature of the U.N. Charter as a treaty, see McNair, Law of Treaties, (London, 1961), pp.25, 81, 216-18, 221. For the reference on the Charter, see Brownlie, Basic Documents in International Law, pp. 1-2.

51. On the entry into force of the U.N. Charter, see Article 110 of the Charter.



While there is now not much controversy as regards the legal nature of the Charter of the United Nations, there still exists various interpretations concerning the legal effect of the resolutions of the United Nations, in particular resolutions of the General Assembly. The legal nature or effect of the United Nations resolutions vary, depending on the kind of U.N. organ adopting them. The diversity of resolutions and their unequal juridical value have made it difficult to evaluate their function as a source of international law. Hence it must be emphasised that "international organisations are created by States on the basis of treaties which define the structure of the given organisation, the jurisdiction of its organs, the effect of resolutions of these organs, etc".<sup>52</sup> The most significant resolutions in the creation of legal norms are those which bind the contracting parties.<sup>53</sup>

Professor G.I. Tunkin, correctly notes that resolutions of International organisations do not create norms of international law ipso facto. The general view is that the resolutions of the General Assembly are mere recommendations. Even if this may be the case, it is

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52. See G.I. Tunkin, op.cit., n.43 above.

53. See Jorge Castaneda, Legal effects of United Nations Resolutions, Translated by Alba Amoia, (N.Y., London, 1969), pp.2-3. For further references on the legal effects of the General Assembly resolutions, see Ibid., Notes, pp.197-231; L.M. Goodrich and W.T.R. Fox, Legal Effects of United Nations Resolutions, (London 1969); E. Yemen, Legislative Powers in the United Nations and Specialised Agencies, (Leyden, 1969).

observed that the General Assembly resolutions may become law through the practice of United Nations and that of the States Members of the U.N. That is, the General Assembly resolutions become norms of customary international law by way of implementation of these resolutions, either by the United Nations itself, or by States.

Under the U.N. Charter provisions which describe the functions and powers of the General Assembly, Article 10 stipulates:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11 (2) provides:

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought to it by any Member of the United Nations, or by the Security Council, or by a State which is not a member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the State or States concerned or to the Security Council or to both.

Article 12 draws the distinction between the functions of the General Assembly and the Security Council. Under this Article the General Assembly shall not make any recommendations with regard to any dispute or situation while the issue is being discussed



by the Security Council, unless the Security Council so requests.

It is noted that Articles 10, 11 and 12 analysed, do not mention anything about the legal nature of resolutions of the General Assembly, except for the mention that the Assembly may make recommendations. How these recommendations shall become law is not set out. It is this silence of the Charter on this very vital question, which leaves room for various legal interpretations.<sup>54</sup>

Since all the above named documents were adopted as General Assembly resolutions it is quite appropriate to treat them just as such, rather than draw a distinction between resolutions of a declaratory type and those which are non-declaratory. After all, for the purposes of this work, it is not important to show that distinction, but rather what is required is to illustrate the legal significance of those resolutions.<sup>55</sup>

It has already been noted above that in terms of the law of the United Nations, General Assembly resolutions are recommendations only, except in certain cases, such as admission of members, where the General Assembly may take binding decisions, but the General Assembly may also take legally binding resolutions in the areas concerning its finances, (Article 17), and on procedural matters, (Articles 20, 21 and 22) of the U.N. Charter. The fact that in principle resolutions as a

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54. For the various legal interpretations of the resolutions of international organisations, see Tunkin, *op.cit.*, Part V, pp. 305-377.

55. See Brownlie, "Legal status of Natural Resources", *op.cit.*, p.260 "The Legal Significance of Resolution 1803 (XVII)".

class are not binding, has led to great confusion and it is sometimes argued that General Assembly resolutions have no legal effect. In some sense this is correct; as such resolutions do not create new legal norms.<sup>56</sup> But if this argument is carried further to conclude that such resolutions can have no effect on the shaping of international law, this becomes a gross error. Hence it may be reiterated that though resolutions of the Assembly as a rule only have the recommendatory character, one must consider the circumstances in which a particular resolution is adopted, the positions taken by the delegations in the debate, the voting, the explanation of votes and the content of the resolution itself, all these are indicators of the evidential significance of the particular resolution.<sup>57</sup> In the view of Professor Brownlie, the key to the problem of the legal status of resolutions of the General Assembly, and especially that of resolution 1803 (XVII), lie with the fact that:

the proceedings of the General Assembly, as of any international conference, are a vehicle for the formulation and expression of the practice of States in matters pertaining to international law. Of course,

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56. See Ibid. p.260; K. Skubiszewski, "Resolutions of International Organizations and Municipal Law", in Polish Yearbook of International Law, Vol.2, 1968-69, pp.80-108.

57. See Brownlie, "Legal Status of Natural Resources", op.cit., p.260; Tunkin, Theory of International Law, op.cit., n.8, citing F.I. Kozhevnikov, "Obschepriznannye prinstpy i normy mezhdunarodnoga prava," Sovetskoe gosudarstvo i pravo, 12, (1959), p.17.



the evidence may be either positive, or negative, if the voting and the expressions of view establish the diversity and fluidity of States practice on the points at issue. Moreover, the language of the resolution itself is of particular significance since this indicates the extent to which the resolution is concerned with the legal aspects of the subject-matter in the first place. For example a resolution may on its face be declaratory of existing legal principles and standards or have the status of an agreed interpretation of the Charter of the United Nations.<sup>58</sup>

It therefore, follows that if one has to evaluate the legal status of resolutions examined in this subsection, it is imperative to conduct one's analysis taking into account all those indicators of the evidential significance of the particular resolution.

The U.N. General Assembly resolution 1803 (XVII); resolutions entitled: International Covenant on Economic, Social and Cultural Rights; Declaration on the Establishment of a New International Economic Order; and the Charter of Economic Rights and Duties of States, are all U.N. documents clearly intended to be normative in character, and indeed some of them have attained that status and significance for international law as, for example, the Declaration on Principles of International Law Concerning Friendly Relations, and Co-operation Among States in accordance with the Charter of the United Nations, resolution 2625 (XXV).<sup>59</sup> Moreover,

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58. See Brownlie, "Legal Status of Natural Resources", p.260.

59. See White, "A new international economic order", op.cit., p.543.

the International Convention on Economic, Social and Cultural Rights is already in force. Which means that the particular resolution is now, undoubtedly, a legally binding instrument.

It may here be concluded that the concept of economic sovereignty has attained, and continues to acquire, a certain degree of international legal acknowledgement.<sup>60</sup> This means that the concept has to a certain extent, gained some legal qualities, which gives it those legal characteristics in it.

Within the context of this work, it has been shown that the legal significance of the concept of economic self-determination is embodied in the legal instruments examined in this subsection.

Although the resolutions of the U.N. General Assembly<sup>61</sup> are only recommendations, and as such do not become law ipso facto, they however, may become law through the United Nations practice or through State practice.<sup>62</sup>

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60. "Loosely speaking, permanent sovereignty is the assertion of the acquired rights of the host State which are not defeasible by contract or, perhaps, even international agreement", see Brownlie "Legal Status of Natural Resources", p.271

61. For further references on the U.N. General Assembly resolutions see Obed Y. Asmoah, The Legal Significance of the Declarations of the General Assembly of the United Nations, (The Hague, 1966); and on the legal nature of international declarations, see L. Oppenheim, International Law; A Treatise, Vol.1, Peace, Ed. by Lauterpacht, (Cambridge 1954), p.898; S. Engel, Law, State and International Order: Essays in Honour of Hans Kelsen, (Knoxville, 1964); C.M. Eichelberger, New Dimensions for the United Nations, (N.Y., 1966); R.J. Erkison, International Law and the Revolutionary State: A Case study of the Soviet Union and Customary International Law, loc.cit.above.

62. See "International Association of Machinists and Aerospace Workers (I.A.M.) v. OPEC and its Members, United States District Court, Central District of



### 3. O.A.U. viewpoint on economic self-determination

The practice of the Organisation of African Unity (O.A.U.) is relevant regarding the exercise of economic self-determination by African States, and here we examine certain aspects of it.

The concept of economic independence as understood by the Organisation of African Unity is embodied in its constitution - the O.A.U. Charter.<sup>63</sup> It is one of the purposes of the O.A.U. to co-ordinate and harmonise the general policies of the member States, especially in the fields of ... "Economic co-operation including transport and communications". Article 2 (2) (b).

62. Continued.....

California, No.78-5012, September 1979, Judge A. Andrew Hauk". Taking cognisance of standards recognised under contemporary international law, the court referred inter alia, to General Assembly resolutions 1803 (XVII) of 14 December 1962. "Declaration of Permanent Sovereignty over Natural Resources", and A/RES/3281 (XXIX) 12 December, 1974, "Charter of Economic Rights and Duties of States". The main point of this case is that the States have a right to regulate the production and prices of their natural resources. The court pointed out that "The United Nations, with the concurrence of the United States has repeatedly recognised the principle that a sovereign state has the sole power to control its natural resources". Commenting on this principle, the court held: "the control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect of its physical attributes. The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resources, is crucial to the welfare of their nation's peoples". This case has made an essential contribution in the understanding of the principle of economic self-determination of sovereign states. But the case has confirmed that the General Assembly resolutions may become law through the practice of the United Nations or through State Practice.

63. See Z. Cervenka, The Organisation of African Unity and its Charter, (Praha, 1968); T.O. Elias, "The

According to Article 20 of the O.A.U. Charter, the Assembly of Heads of State and Government shall establish such specialised commissions as it may deem necessary, including (1) the Economic and Social Commission.

During the first ten years of its existence the O.A.U. concentrated its activities on the affirmation and assertion of political self-determination. This was because of the fact that the first decade of the independence of African countries was basically characterised by purely political problems. There was the desire and necessity to establish the indispensable state machinery for the sovereign exercise of independence.

However, the economic aspect of State independence was not altogether left out. The African Heads of State and Government, meeting in Addis Ababa on 25th May, 1963 to sign the O.A.U. Charter, assigned to the organisation an economic and social task. The reflection of the O.A.U. policies on economic matters is stated in the Charter's preamble stipulating that the Assembly is conscious of the responsibility to harness the natural and human resources of the continent for the total advancement of the peoples in the sphere of human endeavour.

The first Assembly of Heads of State and Government held on the 21st July, 1964 in Cairo, specified in an important resolution that the O.A.U. had the basic role

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63. Continued.....

Charter of the Organization of African Unity", in American Journal of International Law, Vol. 59, 1965, pp. 243-258.



of economic planning and direction in the field of economic co-operation among the Member States. The whole essence of economic planning and direction in the African States by the O.A.U. is to realise the concept of economic independence of each member state. Such a directive policy is expected to produce the achievement of economic independence of the entire continent.<sup>64</sup>

Practical efforts by the O.A.U. to encourage and promote co-operation and economic integration among the member states, for the purposes of attainment of economic independence, is evidenced by a variety of legal instruments formulated by the Organisation. Thus though the O.A.U. Charter does not mention the concept of economic sovereignty, it has provided the Organisation of African Unity with the right to take such measures as may be required, to formulate such legal instruments with the aim to control utilisation of both natural and human resources. But the silence of the O.A.U. Charter regarding this vital question of

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64. For a better understanding of the emphasis by the O.A.U. on its new policy that covers both political and economic matters, see the Organization of African Unity, Document (CM/ST 9 (XXI) entitled "Solemn Declaration on General Policy", (Addis Ababa 1976). The Declaration was made by O.A.U. Heads of State and Government, at their ordinary meeting in Addis Ababa; Ethiopia, from 24 to 25 May 1973, on the occasion of the Tenth Anniversary of the Organization of African Unity; S.K. Asante, "A Year of African Solidarity: The O.A.U. at Eleven", in The Legal Observer, 14 June, 1974, p.278.

economic independence has remained ambiguous.

It is clear that the African States, when they adopted the Charter, had as their main aim and pre-occupation to deal with political problems and they did not, therefore, consider the question of economic independence to be of primary immediate concern.

In the opinion of most African States, it was essential at that time to re-organise, stabilise and consolidate political power first before embarking on an economic programme involving firm commitment to its implementation.

It was and still is well understood that in order to organise the economy of a country, certain economic factors have to be taken into consideration. Some of these factors include the availability of financial and human resources. Availability of financial resources would include that of capital investment, which is needed for developing vital industries and major industrial projects. Availability and utilisation of human resources would include the training of professional and skilled personnel, the organisation of research institutions to conduct research projects in various economic fields in the African countries.

None of the above stated factors could have been tackled on a large scale by any African country immediately after attainment of its political independence or even by the O.A.U. collectively. Though not complete, political consolidation is taking shape. Minimum standards of



political stability, strong enough to encourage economic incentives, are now established in most independent African countries.

As most African countries gain political independence, a great deal of effort is being made by the O.A.U. to direct re-organization and affirm attainment of economic self-sufficiency. In its second decade since establishment, the O.A.U. is successfully attaining major advances on this question of economic co-ordination.

The most important legal instrument formulated by the O.A.U. which is directly related to economic self-determination of the continent is the "African Declaration on Co-operation, Development and Economic Independence".<sup>65</sup> The Heads of State and Government frankly admit in the Preamble of the Declaration that they are "concerned by the ineffectiveness of the measures adopted during the past decade to combat under-development and by the inability of the international community to create conditions favourable for the development of Africa".<sup>66</sup>

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65. See Organization of African Unity, "African Declaration on Co-operation, Development and Economic Independence", (CM/ST. 12 (XXI), (Published by the Information Division O.A.U. General Secretariat P.O. Box 3243, Addis Ababa, Ethiopia, O.A.U. 1976). This Declaration, which was adopted by the Heads of State and Government at their Tenth Ordinary Session at Addis Ababa on 25th May 1973 on the occasion of the Tenth Anniversary of the Organization of African Unity, provides for the opening of a new era as regards the promotion of economic development in African countries.

66. See Ibid., p.2.

Some of the economic questions dealt with in the Declaration are: Promotion of African economic co-operation and integration; mobilisation of human and natural resources; improvement of telecommunications and communications systems; promotion of monetary and financial matters; environment; trade and development financing connected with intra-African trade; international trade; mobilisation of Africa's domestic financial resources; consolidation of African relations with other countries of the Third World; improvement of relations with the Developed Market economy countries and their economic groupings; and improvement of relations with the Socialist Countries.

On the question of natural resources, the Declaration provides that African States:

- A.8. Undertake a systematic survey of all Africa's resources, with a view to their rational utilization and joint exploitation, where appropriate, in order to accelerate the continent's development;
- A.9. Defend vigorously continually and jointly the African countries' inalienable sovereign rights and control of their natural resources.

Other provisions in the Declaration dealing with questions of exploitation and protection of Africa's natural resources are paragraphs A.14 and A.15 which respectively provide as follows:

- A.14. Protect Africa's sea and ocean resources coming within national jurisdiction effectively and jointly from international over-exploitation;



- A.15. Rationally harness, on a continental basis, the research of the sea-bed and ocean floor outside national jurisdiction for the benefit of Africa's development and of its peoples and ensure full participation of the African land-locked countries.

Under paragraph A.14, the African States seek to protect their sea and ocean resources from over-exploitation by the technologically advanced countries. It is considered that even at this time when the African countries do not possess much of the advanced technology which is required to exploit the sea and ocean resources in their territorial waters, measures should be taken to protect the resources from being exhaustively exploited by developed industrial countries. This protectionist right is legally accepted under international economic law, as long as its exercise is confined within national jurisdictions of African States.

Research of the sea-bed and ocean floor outside the national jurisdictions<sup>67</sup> of African States is encouraged at continental level. The O.A.U. is quite aware that none of the African countries can individually or even at sub-regional level undertake a rationalised research programme of the sea and ocean floor resources outside the territorial water limits, simply because

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67. See U.N. General Assembly resolution 2749 (XXV) of 17 December, 1970, "Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of Nations Jurisdiction". The resolution is reproduced in Brownlie, Basic Documents in International Law, pp.112-115.

such undertakings are very expensive in terms of the financial, technological and manpower resources, etc., required in order to put them into effect.

Again on this point, the African countries have a right to utilise those natural resources outside national jurisdiction which may be situated in the open seas or continental shelves stretching beyond national territorial water zones, since such resources are universally considered by the international community to be the natural heritage of mankind. Since utilisation of these resources is supposed to be shared by all mankind, the African States may hope to participate in their development, by way of working directly and very closely with the developed industrial countries who possess the means of exploitation of these resources. Such African participation would promote a justifiable claim to share the benefits that would be brought by the full development of the said resources.

Another legal instrument concerning African economic independence and a rationale utilisation of resources is the "African Convention on the Conservation of Nature and Natural Resources".<sup>68</sup> The main idea

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68. See Organisation of African Unity, "African Convention on the Conservation of Nature and Natural Resources", (published by General Secretariat O.A.U., Addis Ababa, 1977). The Convention which was adopted at the fifth ordinary session of the Assembly of African Heads of State and Government, held in Algiers, from 13th to 16th September, 1968, contains XXV Articles, and has an Annex containing a list of Protected Species. It came into force in October, 1969, as announced by the O.A.U. in a note no. SC/NR/1/405.69 of that date, after the O.A.U. Secretary-General had received instruments of ratification from four Member States (i.e. Upper Volta, Swaziland, Kenya and Ghana). The question of the entry into force of the Convention is stipulated under its Article XXI.



expressed in the Convention is that the utilisation of natural resources must aim at satisfying the needs of the people. The fundamental principle which is described under Article II of the Convention is that the Contracting States undertake to adopt measures necessary to ensure conservation, utilisation and development of soil, water, flora and faunal resources in accordance with specific principles and laws in those countries.

The main objective of the Convention is an expressed desire by African States to undertake individually or jointly action for the "conservation, utilisation and development" of the related assets by establishing and maintaining their rational utilisation for the present and future welfare of mankind. It may be said that the Convention is more concerned with questions relating to the rationale of preservation of natural resources than with questions of their real use for development purposes.

It is better late than never; the second phase of Africa's struggle for independence has started in practical terms. The O.A.U.'s first economic summit<sup>69</sup> was held in Lagos on April 18th, 1980. The Heads of State and Government at that meeting were all agreed that, without economic power, political independence had no meaning. This in itself is an indication that the O.A.U. has begun to perceive the concept of economic independence to an extent where the organisation has indicated the establishment of a common market embracing

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69. See Introduction, Ch.2, n.13, loc. cit., above.

the whole African Continent. The O.A.U., April 1980 Lagos economic summit deemed it a matter of urgency to set up permanent machinery for consultation between African countries on economic matters. It was thought that such machinery would be useful "in sustaining progress towards the attainment of an African common market".<sup>70</sup>

In the final analysis, it may be said that now the African States have in real terms, entered the second phase in the exercise of their right of self-determination: namely, the exercise of economic self-determination.

It can also be said there is certainly no doubt that this second African development decade is going to experience the formulation of new African laws, regulations and rules geared to promote the exercise of the right of economic sovereignty. The present O.A.U. activities concerning economic self-determination indicates this new trend.

## Section B. Major legal methods of exercising economic sovereignty.

### 1. Independence agreements provisions

Having discussed the theoretical aspect of economic sovereignty and utilisation of natural wealth and resources, now we examine the major legal instruments used by African countries when exercising their right to economic self-determination.

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70. See Idem.



Shortly before an African country becomes an independent state, it goes through some kind of a transitional period leading to the attainment of full statehood. It is at this stage leading to the establishment of statehood that the administrative authority and the liberation movement enter into prior independence agreement.<sup>71</sup> An independence agreement is an arrangement which is entered into between a liberation movement in the form of a political party or liberation army of provisional government and the government of the administrative authority, concerning the transfer of power from the colonial authority to the governed people or peoples. Though the transfer of political power is the key issue in an independence agreement, in the majority of cases, provisions on economic matters have been included. Typical examples of these independence agreements have been signed between the Portuguese government and its former overseas African

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71. See Cmd. 7758, "RHODESIA - Summary of the Independence Constitution", presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, November 1979; Rhodesia - Constitutional Conference, Lancaster House, 22 October, 1979, Conference Spokesman Press Release, tabled by Chairman at the Plenary Session on 22nd October 1979; Rhodesia - Constitutional Conference, Lancaster House, Conference Spokesman Press Release, Text of the Acting Conference Chairman's Statement made at the Plenary Session on 31 October, 1979; Financial Times Saturday, November 3, 1979, "Prospects brighten for Rhodesia conference success", by Bridget Bloom, "British proposals for transition period", p.2; The Times Tuesday, November 13, 1979, Parliament: "Labour MPs want agreement with Patriotic Front before Rhodesia returns to legality", p.12; Financial Times Friday, November 16, 1979, Zimbabwe Constitution: "Genuine majority rule", p.4.



territories, Mozambique and Angola.<sup>72</sup> In December, 1979 the British government reached an independence agreement with the people of Zimbabwe.<sup>73</sup> French governments have also signed independence agreements with their former colonial peoples.<sup>74</sup>

But unlike Portugal and France, the United Kingdom did not pursue the practice of entering into independence agreements with its former colonies at the time of decolonisation. Instead of signing an independence agreement, the U.K. government passed Independence Acts of Parliament under which an African country assumes independent status, e.g. Nigeria Independence Act, 1960; Zambia Independence Act, 1964. Since the Independence Acts did not perhaps directly mention some of the vital issues relating to economic sovereignty, separate agreements<sup>75</sup> describing such matters were concluded between the British government and the new independent African nations.

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72. See Independence Agreements between Portugal and her former colonies: Angola and Mozambique, cited below in this subsection. See also Okeke, Controversial subjects of contemporary international law, op.cit.
73. See The U.K. Act of Parliament: Zimbabwe Act 1979, Chapter 60: A., The Times Thursday December 6, 1979, "Parliament, December 5, 1979: Both sides agreed on Rhodesia ceasefire proposals", p.6; The Daily Telegraph, Thursday November 8, 1979, "Yesterday in Parliament: Plan to rush enabling Bill, LABOUR ATTACK "BLATANT POLITICAL MOVE" ON RHODESIA", by "OUR PARLIAMENTARY STAFF", p.12; Ibid., "RHODESIA BILL HAS 4 CLAUSES", by Tony Conyers, Political Staff, p.12.
74. See as an example, Independence Agreement between France and Algerian Liberation Front, cited below in this subsection.
75. These were agreements concerning the inheritance of international rights and obligations by a new Independent African country, e.g. see Agreement between Nigeria and U.K., cited below in this subsection; Richard Allen, "Agreement reached on Zimbabwe debt repayment", in The Times Saturday June 28 1980, p.17; Tim Dickson, "Zimbabwe £100m debt settlement agreed", in The Financial Times Saturday June 28 1980, p.3.



Here we shall only mention agreements relating to the question of State succession. Various such agreements were entered into between the British government and Britain's former African colonies and protectorates at the time of their attainment of statehood.

An agreement was signed between Nigeria and the U.K. on the 21 November, 1960, only four months after Nigeria had attained its political independence. The agreement concerned succession to international rights and obligations by the Federal Government of Nigeria.<sup>76</sup>

A letter signed by the Head of British High Commission in Nigeria, to the then Nigerian Prime Minister and Minister of Foreign Affairs, the late Sir Abubakar Tafawa Balewa, stated that:

I have the honour to refer to the Nigeria Independence Act, 1960, under which Nigeria has assumed independent status within the Commonwealth of which Her Majesty the Queen is Head, and to state that it is the understanding of the Government of the United Kingdom of Great Britain and Northern Ireland that the Government of the Federation of Nigeria agree to the following provisions:

- i) all obligations and responsibilities of the Government of the United Kingdom of Great Britain and Northern Ireland which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Nigeria, be assumed by the Government of the Federation of Nigeria;
- ii) the rights and benefits heretofore enjoyed by the United Kingdom of Great Britain and Northern Ireland in virtue of the application of any such international instrument to Nigeria shall henceforth be enjoyed by the Government of the Federation of Nigeria.

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76. See Cmnd. 1214, Nigeria-U.K., International Rights and Obligations Agreement, in U.K. Treaty Series, Vol. XXIV, p.663.

In his reply of 21 November, 1960, to the High Commissioner's letter, the Prime Minister of Nigeria stated that the Federal Government of Nigeria was in agreement with the provisions as stipulated in the High Commissioner's letter. The Nigerian Prime Minister went on to state that he would seek confirmation from the High Commissioner that the U.K. government was in agreement with the said provisions and that the High Commissioner's Note and his reply constituted an agreement between the two governments.

Agreements of a similar nature to the one analysed above were entered into between the U.K. and other African countries, e.g. Ghana - U.K., 1957, exchange of letters relating to the "inheritance of international rights and obligations by the Government of Ghana"<sup>77</sup>; and U.K. - Gambia, 1966 exchange of letters "relating to inheritance of international rights and obligations by the Government of Gambia".<sup>78</sup>

It may be emphasised that in all these agreements, reference is made to the Independence Acts relating to the particular African country in inheriting the rights and obligations from the U.K.

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77. See Cmnd. 345, U.K. - Ghana, International Rights and obligations: Agreement, in U.K. Treaty Series, Vol. XXX, p.141. The Agreement was signed on 25 November, 1957, in Accra, Ghana.

78. See Cmnd. 3076, U.K. - Gambia, International Rights and Obligations Agreement, in U.K. Treaty Series, Vol. LXV, 1966, p.529. The Agreement was signed in Bathurst on 20 June, 1966.



As a method to exercise economic self-determination, independence agreements form a safeguard legal instrument designed to accommodate the future economic, political and social interests of the parties. Concerning ourselves with only the economic aspects of these agreements, we analyse a few cases.

Agreements relating to state succession,<sup>79</sup> with special reference to natural resources, were signed between France and Algeria. These were a number of Declarations drawn up in common agreement by the Government of France and the Algerian National Liberation Front at Evian-Les-Bains on the 18 March, 1962. They related to various aspects of the topic of permanent sovereignty over natural resources, with special reference to the promotion and protection of acquired rights of French nationals and judicial persons in Algeria and to the exploitation of Saharan mineral resources, especially petroleum and natural gas. On the exploitation of mineral resources in the Sahara, it is stated that:

The General Declaration drawn up at Evian-Les-Bains provides that in the departments of the Oases and the Saoura (Sahara) the development of subsoil resources shall be ensured by a joint Saharan co-operation. The Algerian State will issue mining legislation in full exercise of its sovereignty.<sup>80</sup>

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79. See Algeria - France: Agreement for Independence of Algeria March 18, 1962, in International Legal Materials, Vol.1, 1963, p.214; Algeria - France: Agreement concerning the Exploitation of the Saharan Subsoil, June 26, 1963, in International Legal Materials, Vol.2, 1963; A.G. Mezerik, Natural Resources: Restrictions, Regulations and Agreements, (International Review Service, U.N. N.Y., 1964), paras. 94 - 142.

80. See Mezerik, op.cit., p.25.

The Algerian National Liberation Front as a party to the agreement, was representing the people of Algeria during their transitional period before attainment of full independence. It follows therefore, that peoples have a right to protect their economic self-determination even before achieving political independence.

An independence agreement between the Portuguese State and the Mozambique Liberation Front, entered into at Lusaka on the 7th September, 1974, stipulates in Paragraph 2 that "the complete independence of Mozambique shall be solemnly proclaimed on the 25th June 1975", thus setting the date when a new state comes into existence. Paragraph 3 deals with the structure of the new transitional government of Mozambique, and states that the transitional government will ensure the transfer of powers during the transitional period. The Transitional Government's tasks will be to promote the progressive transfer of powers at all levels and to prepare for Mozambique's independence (paragraph 5). The economic task of the transitional government as laid down in Paragraph 5 (e) is "the financial and economic administration of the territory, namely the establishment of structures and mechanisms of control which may contribute towards the development of an independent Mozambique economy". This sub-point provides for the transitional government of Mozambique to establish institutions to implement and promote exercise of economic



self-determination during the transitional period. As stated in point 18 of the agreement, "The independent Mozambique State will exercise fully complete sovereignty in domestic and external affairs, establishing political institutions and freely choosing the political and social system which it considers best suited to the interests of its people."<sup>81</sup> So, the people of Mozambique exercise their right of economic sovereignty, which is legally provided in the prior independence agreement. Thus again we see that the right of a people to protect its economic interests, before independence is achieved, is a lawful one.

Another independence agreement was signed by the Portuguese government on one side, and three<sup>82</sup> liberation movements of Angola on the other. Since the Movimento Popular De Liberatacao De Angola (MPLA), which was a party to this agreement, has now established an effective government in the country,<sup>83</sup> we analyse below the economic provisions in its "Major Programme" for Angola.

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81. See Agreement Concerning the Self-Determination and Independence of Mozambique, in U.N. Document A/9769, of September 24, 1974.

82. The three Angolan liberation movements which signed the independence agreement with Portugal were MPLA: UNITA: and FNLA. After the capitulation of Portugal, the three movements fought for about six months in a civil war which was won by the MPLA. The other two organisations that had combined their war efforts against the MPLA were defeated.

83. See Blaustein and Flanz, Constitutions of the Countries of the World, Vol.1, (Oceana Pub. N.Y., U.S.). The MPLA Major Programme and the Independence Agreement between Portugal and the three Angolan Liberation Movements, MPLA Programme: Annex II, on p.32.

This programme is contained in Annex II to the agreement. Section 5 deals with "Economic Reconstruction and Development Production". Gradual development and planning of the Angolan economy is mentioned in section 5 (a), and 5(b) talks of the transformation of Angola into an economically independent, industrial, modern, prosperous and strong country. On the agricultural sector of the economy, 5 (c) of the programme talks of the development of agriculture with the primary aims of eliminating monoculture, gradually creating agricultural productivity and gradually mechanising farm work. Since industrialisation is one of the priorities of most African countries, it is stipulated in 5 (d) that there will be "Establishment and ... expansion of state, commercial and industrial enterprises, trading co-operatives and producer co-operatives. Gradual establishment of heavy industry and light industries for the production of consumer goods".

Though paragraph (e) talks about the abolition of the privileges granted by the colonial regime to foreign enterprises, paragraph (i) provides for "Protection of private industry and trade". Further, on private industry, paragraph (j) lays down the "Encouragement of all private industry and trade which is useful to the state's economy and the people".

On the vital question of private foreign investments in Angola, paragraph (k) provides that enterprises



operated by aliens shall be required to comply with the new laws in force in Angola. Thus we see in the MPLA authorities the desire to encourage foreign business operations in Angola, but such operations must be conducted within the framework of the laws of the country in which the enterprises are operating. There is protection of economic enterprises operated by aliens which are beneficial to the life and progress of the Angolan people and to the strengthening of its real independence, paragraph (i). Here we find on the one hand, emphasis being laid on the need to allow foreign enterprises to operate in Angola and on the other hand there is stress on the protection of the economic sovereignty of the country. Hence the requirement that alien enterprises must be beneficial to the Angolan people and should strengthen the economic independence of the future sovereign state.

It is found that the main aim of the independence economic provisions is to lay down certain legal guarantees, with the objective of attracting investments from the former metropolitan State. Such independence economic provisions may be viewed by the particular African country, as laying down the particular necessary legal directives which may be used as guidelines when that particular African country formulates new relevant laws, after it has attained independent status.

## 2. Constitutional economic provisions

One method used by the African countries in the exercise and promotion of their sovereignty is constitutional economic provisions. These are legal provisions fixed in the constitutions, which stipulate how economic planning and development shall be directed and conducted. They form the basic general legal framework legalising the use of land, natural wealth and resources, as well as the conduct of economic activities. In most cases these provisions are contained in independence constitutions, but there are also cases where they are included in new national constitutions introduced as a means of updating in order to keep up with the changing constitutional and environmental circumstances in the particular African country. For an example, new national constitutions were introduced in Nigeria in 1979, and in Libya in 1977. The Libyan constitution proclaims the country a Socialist Republic. Thus Libya becomes the first country in Africa to acquire such a name or status. In cases where national constitutions do not include economic provisions, e.g. Nigerian, Ghanaian, Zairan, and Zambian constitutions,<sup>84</sup> there are Acts of Parliament on various aspects of the national economy and investment. In the light of materials available

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84. See Blaustein and Flanz, op.cit., by consulting the relevant volume under which a country is entered. The volumes are arranged alphabetically by country.



on economic constitutional provisions, only a few countries' constitutions are studied and analysed.

Though the Algerian constitution<sup>85</sup> does not directly mention utilisation of agricultural and mineral resources, it does provide for the exercise of economic sovereignty. Its Article 70 speaks of the High Economic and Social Council which "renders advice upon all legislative projects and proposals of an economic or social nature and can hear members of the Government". In practice the High Economic and Social Council provides advice upon all economic matters including matters concerning mining, agriculture and investment legislation. The advice is rendered to the government which in turn legislates.

Unlike that of the Algerian, the Angolan constitution<sup>86</sup> includes provisions on the use of natural resources, protection of private property including foreign owned property, and promotion of economic development for the whole country. In Title 1, on fundamental principles, Article 5 states that "economic, social and cultural solidarity among all regions of ... Angola will be promoted by common development of the entire..... nation and elimination of the results of regionalism and tribalism". This article is included because most African countries are

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85. See Idem., Vol. 1, p.13.

86. See Ibid., Vol. 1, pp. 2-3.

torn apart by tribalism which destroys the consolidation of national economic development, hinders the progressive development of the national market, and discourages investment growth at national level.

Article 11 declared that "All resources of the soil and subsoil, territorial waters, continental shelf and air space are the property of the state, which shall determine the conditions under which they are exploited and used". Under this article we see that the state controls and determines the utilisation of natural resources. Thus the Angolan peoples exercise their economic sovereignty and indeed sovereignty in general, through their representatives in the National Assembly.

The importance of agriculture to the Angolan economic development is stressed in Article 8. It stipulates that, "The People's Republic of Angola considers agriculture as a base and industry as a decisive factor in its development. The State shall direct and plan the national economy, for the purpose of systematically and harmoniously developing all natural and human resources and utilisation of wealth for the benefit of the people".

Private property is constitutionally protected in Angola. Article 10 provides that "The People's Republic of Angola recognises, protects and guarantees private property, including that of foreigners, provided that this benefits the economy of the country and the



interests of the Angolan people". So we notice that despite the fact that public property is granted first priority, there is room in the Angolan constitution for the development of private property that benefits the whole people.

The next constitution we examine is that of Mozambique. This constitution as will be shown, is in principle similar to that of Angola. It also emphasises public rather than private ownership of property, thus giving priority of development to the public sector of the national economy. Like most of the African countries, Mozambique is an agrarian country. This fact is shown in the contents of Article 6 of the constitution:

The People's Republic of Mozambique, taking agriculture as a base and industry as a driving and decisive factor, directs its economic policy towards the elimination of underdevelopment and the creation of proper conditions for raising the living standards of working people. In the prosecution of this objective the state bases its action primarily on the creative force of the people and on economic resources of the country, giving total support to agricultural production, encouraging adequate utilisation of production enterprises and proceeding with the exploitation of natural resources.<sup>87</sup>

In this article full support is given also to encouragement of the promotion of production enterprises and utilisation of natural resources. According to Article 8, "Land and the Natural Resources of the soil and the subsoil, of the territorial waters and the continental shelf of Mozambique belong to the state,

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87. See Blaustein, & Flanz, op.cit., Vol.IX, for the Mozambique Constitution, pp. 2-3.

which will decide on the conditions of their utilisation."<sup>88</sup> Part Two of this article states that Mozambique recognises as binding on it, the Charter of Economic Rights and Duties of States adopted by the XXIX Session of the U.N. General Assembly. Such a unilateral recognition of the legal effect of the General Assembly resolution would not have been necessary if the Charter of Economic Rights and Duties of States had been in force. So we find here that through its own practice, Mozambique gives a legal interpretation or a legal meaning to that U.N. General Assembly resolution 3218 (XXIX). The Mozambican position confirms a point made earlier on that the resolutions of the General Assembly may be given legal effect through State practice.

To ensure economic use of natural resources, Article 9, stipulates that the Mozambique state "promotes economic planning aimed at assuring the proper use of the country's wealth for the benefit of the people..."

Emphasis is laid on the importance of the public sector of the economy in Article 10 which provides that in Mozambique the "economic sector of the state is the directing and driving force of the national economy. Government owned property receives special protection, its development and expansion being the responsibility of all state bodies, social organisations and citizens."

Article 11 speaks of the state encouragement of individual peasants and workers to "organise themselves

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88. See Ibid., pp.2-3.



into collective production enterprises whose development" it will direct and support. It also states that the "State recognises and guarantees personal property". It is noted that the constitution makes a distinction between private and personal property. As Article 13 provides, "obligations are attached to private property. Private property cannot be used in the detriment of interests entrenched in the Constitution". The difference between private and personal property being that the latter is acquired by means of using the system of exploitation of "Man by Man". Under the last paragraph of Article 6 mentioned above, this system of exploitation of "Man by Man" will be stamped out in Mozambique.

On the question of foreign capital operating in Mozambique, Article 14 provides that "Foreign capital may be allowed to operate within the framework of the economic policy of the State". Again we see that the Mozambique State realises the essential role that is played by foreign capital investment in the process of economic development of the country. Analysis of the constitutional economic provisions of Algeria, Angola and Mozambique show that priority of economic development lies in state and collective enterprises. Private industry is allowed to exist on condition that it benefits the economy of the country and the interests of the people.

As in the Algerian constitution, the Ivory Coast constitution provides in Title IX that there be an

"Economic and Social Council" which advises the government on economic and social matters. According to part (1) of Article 67, "the Economic and Social Council shall give its advice on Governmental Bills, ordinances and decrees, as well as on private bills submitted to it". Planning bills of an economic and social nature shall be submitted on any problem of an economic or social nature. Thus the government may be advised on planning bills or on any related problems. The President of the Ivory Coast may consult the Economic and Social Council on any economic and social problems, (part 3). This article therefore provides the legal basis for the exercise of economic sovereignty by the Ivory Coast.

The Kenya constitution of 1969, which does not touch on all questions of economic development, touches on one of the most vital aspects of the problem, namely the aspect of land and mining rights.

From the above discussion in this subsection, it may be deduced that constitutional economic provisions in African national constitutions, provide for the exercise of economic self-determination. Those provisions also stipulate the legal requirement for foreign investments, especially, when such foreign investment is conducted in the private sector of national economy of a particular African country. It may also be concluded that these legal provisions are used as guarantees to both national and foreign investors.



### 3. Investment law<sup>89</sup> provisions

The purpose of investment laws is to enumerate, classify and define pioneering or established and approved industries. They describe the competent executive authority responsible for examining and supervising investments. They usually incorporate conditions of entry of foreign capital and the rules of remittance. Regulations also include tax provisions affecting investments which are applicable to beneficiary industries. Other features of these laws relate to employment of nationals, rules of compensation for nationalised property and the procedure of settlement of disputes. Investment laws thus facilitate and often attract foreign and domestic investments, creating a recognisable structure of legal relationships involved. Investment laws provide the framework for the government policy both for political investors and administrators. The proper execution of these laws can lead to raising and ultimately influencing the level of economic development. Thus, the level of exercise of economic sovereignty by a host State is increased on one hand, while the economic rights of private foreign investors are protected on the other hand.

Investment law regulations are normally divided into two categories. In most African countries, there

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89. See International Legal Materials, Vol.3, 1964, "U.N.E.C.A. Report on Investment Laws and Regulations in Africa", p.179; U.N.E.C.A., Investment Laws and Regulations in Africa, (U.N. N.Y., 1965).

are investment codes, which come about as a result of national legislation by passing either Acts of Parliament, Decrees, or Ordinances. The other category which may be said to emanate from within the framework of national investment laws, is international investment agreements between an African government or its representative and a foreign government or any of its competent authorities or a private investor engaged in investment operations. Both national investment laws and international investment agreements are studied and analysed below.

The Algerian Ordinance No. 66-284 of September 15, 1966 which constitutes the Code of Investment stipulates in Article 1 (1) that "the ordinance defines the framework in which is organised the intervention of private capital in the national economic development."<sup>90</sup>

On the exercise of economic sovereignty, Article 2 provides that:

The initiative for effecting investments projects in vital sectors of the national economy belongs to the State and its dependent organisms. However, the State may decide to call on private capital to realise those projects. It then determines, case by case, the conditions for the intervention of national or foreign private capital in such investments. A decree will define those sectors considered to be vital in the meaning of the present ordinance.

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90. See American Society of International Law, International Legal Materials, Current Documents, Vol. VI (6) Number 1, January 1967, "Algeria Investment Code" issued September 15, 1966, p.92; E.S. Nwogugu, The Legal Problems of Foreign Investments in Developing Countries (Manchester, 1965); R.B. Lillich, The Protection of Foreign Investment, (N.Y., 1965); G. Schwarzenberger, Foreign Investment and International Law, (London, 1969).



According to this article the state and its competent organisations can take appropriate measures to effect investment projects. In cases when the State finds it necessary and in the interest of national development, it may call on national or foreign private enterprises to engage on capital investment in such industry as approved within the legal framework of the investment code; and other relevant laws. The State determines conditions on which private investments may intervene in their process of economic development. In short, Articles 1-6 lay down the principles under which investment may be conducted. Articles 7-13 deal with the guarantees and advantages accorded to capital investments undertaken pursuant to Articles 2-3-4 and 6.

The vital question of compensation when the state nationalises private property is dealt with in Article 8 of the Ordinance. It states that in the event that the public interest imperatively requires the recuperation by the state of enterprises benefiting from the provisions of the code, nationalisation shall be declared only in a text of a legislative character. The state shall pay "within a maximum delay of 9 months"<sup>91</sup> an indemnification, equal to the net value, of the property being nationalised. The Article states

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91. See Algeria: Investment Code, in International Legal Materials, Vol.6, 1967.

clearly, that the "indemnity is transferable abroad, if the beneficiary is himself an alien and if the investment has been realised with the help of funds imported into Algeria".<sup>92</sup>

In general, the transfer and repatriation of capital from Algeria is dealt with in Article 11. According to this Article, foreign investors are guaranteed the right of "(1) .... transfer of the distributed part of net annual profits of the enterprise, set after deduction of depreciation or necessary allowances and taking into account its indebtedness."<sup>93</sup>

Articles 14 to 19 talk of financial advantages that may be enjoyed by private enterprises, and Articles 20 to 33 describe the conditions of charter granting, and the basis on which a charter to operate a company may be given. The Algerian authority who may grant charters is described as Minister of Finance and Planning.

Under Decree No. 156/PR constituting the Investment Code of the Republic of Chad, Article 1 states that "Private investments in ... Chad benefit from a system of general law (droit commun) and privileged regimes".<sup>94</sup> Furthermore, operating agreements may be concluded between the government and accepted firms. So, we see here that

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92. See Ibid., pp.92-94; V. Solodovnikov, & N.Gavrila, "Africa: tendencies of non-capitalist development", in International Affairs, (Moscow, 1976) pp. 31-39; F. Engels, The Origin of the Family, Private Property, and the State, (N.Y., 1972).

93. See Ibid., pp. 92-94.

94. See Chad: Investment Code, in International Legal Materials, Vol.3, 1964, p.24; A. Rake, "What future for Private Investment in Africa", in African Development, Vol.2, March 1969, p.7; Ezequiel A. Camerini, "Argentina as a Host Country for North American Investments", in The International Lawyer, Vol.9, 1975, pp. 407-430.



both the law and investment agreements may be used to exercise state economic sovereignty.

General Law Regimes (Regime de droit commun) include all general guarantees. Article 2 guarantees acquired rights of all kinds to firms established in Chad. Within the framework of exchanges regulations, the state guarantees the right of transfer of capital, especially in the case of: 1) duly audited profits; 2) funds derived from transfer or cessation of business, Article 3. In Article 4, business firms whose capital comes from other countries, as well as branch offices of firms from countries other than Chad are permitted to acquire rights of all kinds facilitating the carrying out of their particular activity. These include property rights, industrial rights, concessions, authorisations and administrative permissions, participation in the open market under the same conditions as Chadian enterprises. Thus here we notice that Chad exercises its economic sovereignty within the framework of the provision of this Code.

As a means to exercise economic sovereignty and to promote economic development, the Egyptian People's Assembly, on June 19, 1974, approved the Law on Arab and Foreign Capital Investment.<sup>95</sup> In Article 1, it is

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95. See Egypt: Law on Arab and Foreign Capital Investment, in International Legal Materials, Vol.13, 1974; p.1500; United Arab Republic: Foreign ownership of agricultural land, Decree: January 19, 1963, in International Legal Materials, Vol.2, 1963, p.488; J.W. Salcuse, "Egypt's New Law on Foreign Investment: The Framework Economic Openness", in International Lawyer, Vol.9, 1974, pp. 647-661.

stated that "Arab and foreign investments and free zones are governed"<sup>96</sup> by this law. The law provides for companies of both Arabic and foreign origin to conduct projects in such fields as mining, industrialisation, energy, tourism, transportation and others. The investment of Arab and foreign capital in Egypt shall be for the purpose of realising the objectives of economic and social development within the framework of the State's policy and national planning. The projects of investment are made in the areas requiring international expertise in the spheres of modern development or in areas requiring foreign capital (Article 3). In essence, the contents of this Article are typical of most African countries' investment law provisions for the protection of national economic sovereignty and of guarantees given to foreign investments operating in the particular country. As Article 6 stipulates, "Capital invested in the Arab Republic of Egypt under the provisions of this law, irrespective of the nationality or domicile of its owner, shall enjoy the guarantees and privileges set forth in this law".<sup>97</sup>

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96. Free Zones: it is presumed, are areas of land, according to Article 26 of the Investment Code, "created therein", meaning in Egypt, for purposes of economic development. Both private and public companies could invest in Free Zones.

97. See Egypt: Law on Arab and Foreign Capital Investment, op.cit., p.1502, Egypt - Japan: Agreement on the Encouragement and Reciprocal Protection of Investments, January 28, 1979, in International Legal Materials, Vol.18. 1979, p.44.



On the question of nationalisation, the state may exercise its right to nationalise or confiscate any project or property but "the assets of such projects cannot be seized, blocked, confiscated or sequestered except by juridical procedures."<sup>98</sup> Here the courts and other juridical methods used in the settlement of investment disputes are employed in the event of such disputes arising as a result of acts of nationalisation, confiscation or requisition of investment property.

As a measure to promote, encourage and protect economic sovereignty, the government of Tanzania (then Tanganyika) introduced a new law on investments. The Tanganyika Parliament enacted Law No. 40 of 1963 under the title "Tanganyika Foreign Investment (Protection) Act". This law describes a foreigner as a person who is not a citizen of Tanganyika, which includes a body corporate not being a body incorporated in Tanganyika. Foreign assets according to the Act, include:

foreign currency, credits, rights, benefits or property, any currency, credits, rights, benefits or property obtained by the expenditure of foreign currency, the provision of foreign credit, or the use or exploitation of foreign rights, benefits or property and any profits from investments in an approved enterprise by the holder of a certificate issued under section 3 in relation to that enterprise;

It therefore follows that in order for a country to protect foreign property or foreign investment, it should spell out the distinction between national and foreign property and property rights. The distinction is found necessary due to the fact that every state

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98. See Egypt: Law on Arab and Foreign Capital Investment, op.cit., p.1502.

desires to protect the right of its nationals both abroad and at home. The nationals themselves would like their rights over property, including investments, secured and protected wherever the property may be situated. Thus it becomes necessary to have such provisions guaranteeing the rights of foreign investors on one hand and protecting the rights of a state to legislate on such matters as the one described in section 2 of the Tanganyika Act.<sup>99</sup>

Under section 3 of this Act, the State exercises its economic sovereignty, by issuing investment certificates in which is stated the name of the enterprise; the name of the certificate holder; the proportion of foreign assets involved; the period of investment, and other relevant matters.

In the event of nationalisation, compensation will be paid in the approved foreign currency and may be transferred out of the country, section 6 (4). In respect of profits made by an approved enterprise, the profits may be transferred out of Tanzania in the approved foreign currency and at the prevailing official rate of exchange, section 7. Thus again we see that

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99. See Tanganyika Foreign Investment Act: of 1963, in International Legal Materials, Vol.2, 1963, p.306; Tanzania - China: Friendship Treaty, signed February 20, 1965, in International Legal Materials, Vol.4, 1965, p.305; Tanzania: Nationalisation Laws, in International Legal Materials, Vol.6, 1967, pp. 1194-1227; A. Rake "An Economy in Transition: Tanzania Economic Survey", in African Development, Vol.6, December 1970, pp.T5-T7; J. Bognar, Economic Policy and Planning in Developing Countries, (Budapest, 1968).



the state controls the flow of capital in and out of its territory. Also controlled is the proportion of capital allowed for repatriation in the form of profits.

The Kenya Foreign Investment Protection Act of 1964 covers such questions as the issuing of investment certificates by the Minister concerned; the right of investors to transfer profits out of Kenya; compulsory acquisition; protection from deprivation of property; and rules of procedure for granting investment certificates.

In the interest of Kenyan economic sovereignty and development, section 3 provides that:

(1) A Foreign national who proposes to invest foreign assets in Kenya may apply to the Minister for a certificate that the enterprise in which the assets are proposed to be invested is an approved enterprise for the purpose of this Act.

(2) The Minister shall consider every application made under subsection(1) of this section and in any case in which he is satisfied that the enterprise would further the economic development of, or would be of benefit to, Kenya, he may in his discretion issue a certificate to the applicant.

(3) Foreign nationals who have already invested foreign assets in Kenya shall be entitled to the grant of a certificate on application provided that a certificate may be withheld if the Minister is not satisfied that the enterprise is of benefit to Kenya.

Objective analysis of the above cited subsections of the Kenyan law on foreign investment should lead us to the interpretation that they convey a simple message that Kenya exercises its economic sovereignty in the

light of this Act and other related legal instruments.<sup>100</sup>  
 It means that this Act and other legal instruments regulating the conduct of economic activities either by foreign nationals or by Kenyans are all legal instruments which may be employed to govern the promotion of the exercise of economic self-determination by Kenya.

On the transfer of investment profits, section 7 states that profits may be transferred out of Kenya in the approved foreign currency and at the prevailing official rate of exchange, but such transfer may happen only after taxation of these profits from foreign investment assets. Profits may also be transferred after sales from liquidation or as a going concern, of the approved proportion or any part of the approved enterprise. Further, profits from the principal and interest of any loan specified in the investment certificate may also be transferred out of Kenya.

In the case of nationalisation or compulsory acquisition of property, the law provides in section 8

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100. See Kenya Foreign Investment Protection Act, of 1964, in International Legal Materials, Vol.4, 1965, pp. 241-244; Kenya: Draft Articles on the Concept of an Exclusive Economic Zone beyond the Territorial Sea: of August 7, 1972, in International Legal Materials, Vol.12, 1972, pp.33-35; P. Ofosu-Amaah, "Restrictions of Aliens in Business in Ghana and Kenya", in International Lawyer, Vol.8, 1974, p.452; A. Jayagovinda, "Regulation of Foreign Enterprises in India: An Inquiry into Foreign Exchange Regulation Act, 1973", in I.J.I.L., Vol.17, 1977, pp.325-334.



of the Act, that:

No approved enterprise or any property belonging thereto shall be compulsorily taken possession of, and no interest in or right over such enterprise or property shall be compulsorily acquired, except in accordance with the provisions concerning compulsory taking of possession and acquisition and the payment of full and prompt compensation contained in the Schedule to this Act.

Here the law stipulates that no property shall be compulsorily taken possession of and that in the event of nationalisation, full and prompt compensation shall be paid to the owners of the property. But this compensation shall be paid in accordance with the Kenyan laws and regulations concerning the protection of the investor's rights and those of the State.

One may safely conclude that African investment laws play a very viable role in regulating foreign investments in those countries. Most African States have satisfactorily used investment laws to elevate the exercise of their right of economic self-determination.

#### 4. Investment Agreements

Apart from the investment laws, there are international investment agreements.<sup>101</sup> These concern the protection of investments of the Contracting Parties, in their respective countries. African countries have entered into such agreements with various developed countries with a view to guaranteeing investment projects

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101. Egypt - U.S.: Investment Guarantee Agreement, in International Legal Materials, Vol.13,1974,p.1257; Egypt - U.K.: Agreement concerning Promotion and Protection of Investments, in International Legal Materials, Vol.14, 1975,p.1470; Lesotho - U.S.: Investment Guarantee Agreement, in U.N. Treaty Series, Vol.688, p.275. For further references on investments see bibliography below.

and protecting their economic self-determination.

In the agreement signed between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Cameroon on 29th July, 1963, entitled "Agreement on Commercial and Economic Co-operation",<sup>102</sup> Article V is devoted to the protection of investments. It stipulates:

(1) Within the framework of national legislation in force on the date of signature of this Agreement relating to investment each Contracting Government shall accord to investments, real property, rights and interests owned by or held indirectly by, nationals, concerns, associations or companies of the other country in its territory fair and equitable treatment.

(2) Nationals, concerns, companies and associations of one country shall only be subject to expropriation in the other on the grounds of public interest. If one of the Contracting Governments expropriates or nationalises or takes any other confiscatory measures against the property, rights or interests of nationals, concerns, associations or companies of the other country it shall, in accordance with international law, make provision for the payment of adequate and effective compensation. Such compensation shall be paid without undue delay to those entitled to it. Measures of expropriation, nationalisation or confiscation shall not be discriminatory or contrary to a specific undertaking.

The Agreement mentions the use of both international and national law as regards the regulation and governing of property, interests and rights of the Contracting Parties. However, part (1) of the Article stresses the

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102. See Cameroon - U.K.: Agreement on Commercial and Economic Co-operation in International Legal Materials, Vol.2, 1963, pp. 1030-1034.



use of national law, while (2) deals with the question of confiscatory measures which may be taken on the grounds of public utility, and emphasises that such confiscatory measures shall be taken in accordance with rules of international law.

An "Investment Guarantee Agreement"<sup>103</sup> was signed between the governments of the United States of America and Egypt in Cairo on 16 July, 1974. This Agreement which refers to an earlier Agreement effected by the exchange of notes between the two Governments on June 29, 1963 on the subject to investment guarantees, takes the form of an advice from the Government of the United States of America to the Government of the Arab Republic of Egypt on the question of investment guarantees issued by the U.S. Government.

The U.S. Government advised that if the Egyptian Government agrees:

the investment incentives programmes of the United States of America ... referred to as investment insurance and investment guarantees and currently administered by the Overseas Private Investment Corporation, can be resumed in connection with the projects that are approved by the Arab Republic of Egypt.

The Government of the United States of America agrees that if the Government of Egypt is willing, when the Egyptian Government or its agency has entered into a contract with a private United States firm for

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103. See Egypt - U.S.: Investment Guarantee Agreement, op.cit., p.1257. On investments in general, see Leslie L. Rood, "Foreign Investment in African Manufacturing," in The Journal of Modern African Studies, Vol.13, (London, 1975), pp.19-34; Niki Tobi, "Legal Aspects of Foreign Investment in Nigeria," in Indian Journal of International Law, Vol.18, 1978, pp. 16-40.

the construction or other professional services to a project sponsored by the Egyptian Government, such a contract shall be considered the approval and agreement required by paragraph two of the exchange of notes dated June 29, 1963. In all other cases, e.g. individual projects, approvals and agreements by the Egyptian Government shall be required.

By confirming<sup>104</sup> that the U.S.A. note of advice was acceptable, Egypt had thus entered into an agreement with the U.S. Thus we find that this kind of agreement provides for economic guarantees and independence for the parties. In the case of Egypt, which has an underdeveloped economy, the agreement provides for a background or basis for economic development by encouraging foreign investment in the country.

It is found essential, however, in the following paragraph to emphasise two salient points emerging from the discussions above in this subsection. The two points are both associated with the exercise of a State's economic sovereignty: (a) The right of a State to exercise economic sovereignty; and (b) The limitations on the sovereignty with a view to encouraging and protecting the rights of foreign investors.

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104. See Egypt - U.S.: Exchange of Notes of June 29, 1974, in United States Treaties, Vol. 14, p. 945. The Government of the United Arab Republic of Egypt confirmed that the U.S. Note of July 16, 1974 was acceptable by their note of July 16, 1974; Egypt - U.S.: Investment Guarantee Agreement, op.cit., p. 1257. On general policy in Africa see R.B. Seidman, "Law and Development: the Interface between Policy and Implementation", in The Journal of Modern African Studies, Vol. 13, (London, 1975), pp. 41-52.



Under international law a State in which foreign investments are operating may take all such measures as may be found necessary to effect the exercise of economic sovereignty. Such measures may include; investment legislation; measures of expropriation; entering into international investment agreements; observation of investment treaty provisions; international investment declarations; treaty rights pertaining to natural resources; and provision of investment guarantees by host State. But although it is legitimate for a host State to take the measures stated above, the exercise of those sovereign rights is not without limitation. It may be said here that limitation of exercise of State economic sovereignty is seen, first of all, in the exercise of taking the measures enumerated above. By passing the legislation pertaining to foreign investments operating in its territory, a State may be said to be protecting those investments. The investor under investment laws is accorded certain rights e.g. the right to expatriate the investment capital profits<sup>105</sup> and gains accruing as a result of such investments, the right to compensation in the event of nationalisation of the investment property, etc.

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105. See The Times Thursday May 8, 1980, p.16 "Mr. Mugabe seeks to reassure foreign investors over profits" by Frederik Cleary, Salisbury, May 7; The Guardian Thursday June 19, 1980, p.8 "Zimbabwe assurance", from Reuter at, Victoria Falls, Zimbabwe; The Times Monday March 17 1980, p.21, China: "New laws to attract foreign business", by Marcel Berlins; C. Stoneman, Foreign Capital in Zimbabwe; (UNCTAD Geneve, 1979); Clarke, Foreign Companies and International Investment in Zimbabwe, loc. cit., n.15 Ch.2 above; J.H. Wallace, "International Licensing practice", in The International Lawyer, Vol.10, No.2, p.275.

According investment guarantees to the investors is one way for a State to limit its economic sovereignty.

Secondly, the host State, when it signs or enters into an investment agreement, by that act alone limits its economic sovereignty. Furthermore, the investment agreement itself would contain such provisions as are in the mutual interest of the parties - foreign investor and host State. Since those provisions accord certain rights and impose certain obligations on the parties, thus covering the protection of investment rights of the investor, there is a limitation of the economic sovereignty of the host State.

In some investment agreements, there are provisions concerning the settlement of investment disputes.<sup>106</sup> This also limits the economic sovereignty of a host State.

##### 5. Mining Law Provisions

One of the most essential legal methods African States use to exercise their economic self-determination is mining law.<sup>107</sup> Mining and minerals conservation and

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106. See Chapter 6 below where International Investment Disputes are discussed. For further references on the question of Investment Agreements, see the bibliography below.

107. See Acts of Parliaments, Decrees, etc., of various African States given in footnotes below in this subsection; H. Cotton, The Law of Oil Concessions in the Middle East and North Africa, (N.Y., 1967); W. Fox, Tin: The Working of a Commodity Agreement, (London, 1974); R. L. Prain, Copper: the Anatomy of an Industry, (London, 1975); Mezerik, loc.cit., n.79 above Ch.2. The importance of minerals is stressed by Elmer W. Pehrson, who writes that: "modern warfare basically is a war of minerals. Here the machine is supreme. Trucks, tanks, guns, aeroplanes, battleships, submarines, guided missiles and A-bombs are machines fabricated from and powered by mineral raw materials. Ammunition and project-



development play a very significant role in the development of economic independence. In most African countries where mining is still yet to be developed, and where agriculture must be given the first priority in order to establish the backbone for economic growth, mining legislation still remains one of the vital businesses for legislative bodies.

Despite many dynamic and progressive changes that have occurred over the past decade in relation to the production of natural resources in Africa, mineral production is still carried out through contractual arrangements between the host country governments and foreign firms. It must be admitted that the foreign firms having been used to enjoying certain privileges and advantages given them by the former colonial administrations that favoured and promoted foreign nationals to dominate the economic life of the administered territories, found it difficult to bear restrictions imposed by the new African governments. Because the old colonial administrations had deprived the African peoples of the means to participate in the public economic life of the territory during the colonial time, and most especially with respect to the mining

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107. Continued.....

iles are products of mineral origin, and not to be overlooked is the importance of mineral crops in peace and war", see E.W.Pehrson, Economics of Mineral Industries, 2nd Ed., (N.Y., 1964), p. 512; W. Armstrong, "The future for mining investment in Africa", in African Development, 10, 1976, p.581-3; P.S. Rao, "Offshore Natural Resources: An Evaluation of African Interests, in Indian Journal of International Law, Vol.12, 1972, p.345.

industry, the new African governments took it as their duty to restore the economic sovereignty of their peoples in this field. The increased awareness by the African countries, of the issues relating to economic sovereignty, have affected numerous relationships between them and the foreign investors in various industries including the mining industry. The African countries are concerned with issues of sovereignty and control plus the participation of African capital and nationals in the mining development projects. Thus though foreign capital investment still dominates the mining industries of various African countries, the trend is towards an involvement of the nationals and national capital, with the aim of eventually eliminating foreign economic domination.<sup>108</sup>

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108. See for example the Congo (Leopoldville): Decree cancelling Belgian Companies' rights to grant mining concessions, effective November 29, 1964, in International Legal Materials, Vol.4, 1965, p.323; Malcolm J. Grievey, "The Political Economy of Resources: Africa's future in the Global Environment", in The Journal of Modern African Studies, Vol.16, No.1, (London 1978), pp.1-32. A further illustration on the importance of minerals as seen by Pehrson, is in that the Government of the United States of America, in order to secure and preserve its military and economic sanctions on Rhodesia by amending its commercial laws under what has come to be known as the "Byrd Amendments" which permitted it to import chrome from Rhodesia. The U.S. Government argued that because of the "strategic importance of the Rhodesian Chrome", which is necessary for American industries, the import of chrome would continue regardless of the point that economic sanctions against Rhodesia were to be observed; Congo (Kinshasa), The Mineral Industry of Katanga and Kivu, in Mineral Trade Notes, Vol.68, March 1971, pp. 36-41; R.F. Mikesell, "The Copper Economy in Zaire", in Commodity Export and African Economic Development, Ed. by S.R. Pearson, (London, 1974), p.179.



The terms governing the relationship between a foreign investor in mineral development and the government of an African country are usually set forth in ad hoc arrangements. Although most African countries have general mining codes, foreign investment laws, and general income tax codes, their laws often allow government officials considerable latitude in shaping the individual arrangements to fit the particular circumstances. The 1965 Act of Parliament of the Republic of Ghana entitled the Mines and Minerals (Conservation and Development) Act, states in section 1 (1) that "the Minister may, by legislative instrument, make such regulations for the conservation and development of mines and minerals as he may think fit."<sup>109</sup> The question of ownership of minerals is clearly dealt with under section 5 of the Minerals Act and Regulations (Amendment) Decree, 1968.<sup>110</sup> It provides that the Government of the Republic of Ghana shall on behalf of the people of Ghana have the right of pre-emption of all minerals raised, won, or obtained in Ghana or

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109. See Ghana: The Mines and Minerals (Conservation and Development) Act, 1965, Printed by the Government Printing Department, Accra, 1965, GP/A11095/4.370/4/65.

110. See Ghana: Decree Amendment Minerals Act and Regulations, November 27, 1968, in International Legal Materials, Vol.8, 1969, pp.110-112; Zambia: Mining (Amendment) Act 1967, in the Republic of Zambia Government Gazette, 30 January 1976; Zambia: The Mines and Minerals Act, 1969, in Mineral Trade Notes, May, 1970; Mining Journal, Vol.263, No.6728, 1964, "Co-ordination of Development Aid", p.237.

from lands covered by the territorial waters and the continental shelf by any existing holder or by any holder of a licence granted under the Act and of products derived from the refining and treatment of such minerals. Subsection (2) of section 5 states that the Government may, by executive instrument in the form of an order appoint any statutory corporation to act as the Government's agent for the exercise of the right of pre-emption. In this way the government exercises the right of economic independence by laying down the legal instrument of control and ownership of mineral resources.

Analysis of the mining laws in Africa show that there is a difference both in context and significance between those laws which have been formulated in the early years of, or at the time of achievement of, political independence.<sup>111</sup> The early laws, which in many countries have been improved to suit the changing circumstances and environment, did not incorporate provisions on certain very sensitive and important matters. Such matters would be in the areas of capital

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111. See for example, Gold Coast: Diamond Mining Industry Protection, (Colony), Chapter 130, Ordinance Nos. 11 of 1926 and 29 of 1926, Printed by the Government Printer at the Government Printing Dept., (Publication Branch), Gold Coast Colony, and from the Crown Agents for the Colonies, 4 Millbank, London 1926; Gold Coast: (Including Togoland under United Kingdom Trusteeship), Revised Edition, 1954, prepared under the authority of the Revised Edition of the Laws Ordinance, 1951, The Mining Rights Regulations Ordinance (Colony and Ashanti), Chapter 153, Printed by C.F. Roworth Ltd., 88 Fetter Lane, London E.C.4., 1954; Mining Journal, Vol. 263, No. 6728, 1964, "Mining in Equatorial Africa", p.237.



investment by nationals in the various sectors of the country's economic life. In the mining industry for instance, as has been pointed out already, African nationals were excluded from capital investment due to lack of financial opportunities, a situation resulting from the earlier colonial laws which excluded the African nationals from participating in capital investment. Naturally, the legislative assemblies in various African countries try to meet this requirement to involve the Africans in capital investment by introducing new laws encouraging them to engage in businesses which previously used to be reserved for foreign investors.<sup>112</sup> The recent Zambian Mining Act of 1976 is a very good example of such new laws intended to encourage the participation of Zambian citizens in capital investment in the mining industry.

In the objectives and reasons of this act, introduced to amend the law relating to mines and minerals, point (e) states that:

the grant of mining licences for building and industrial materials shall be restricted to enterprises which are wholly owned and directed by a Zambian citizen in the same way as building mineral permits with provisions for exemption in the national interest and for termination if the licence or permit ceases to be wholly owned by a Zambian citizen.<sup>113</sup>

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112. See Samuel K.B. Asant, "Restructuring Transitional Mineral Agreements", in American Journal of International Law, Vol.73, 1979, p.335; The Times, Monday March 17, 1980, p.26, "Cautious Optimism in Rhodesia-Mining".

113. See Zambia: The Mines and Minerals Act, 1976, p.1; Zambia: Copper, The Output of Copper during 1968, in Mineral Trade Notes, Vol.67, No.3, p.7-8; Rhodesia and Nyasaland: Mineral Survey of Nyasaland in 1959, in Mineral Trade Notes, Vol.50, No.2, Feb.1960, pp.30-31.

Here we see that the law emphasises the point that Zambian citizens must be protected against foreign capital investment competition if they are to invest in the mining industry.

On the question of ownership of minerals, the Zambian Act categorically stipulates in 3 (1) that "All rights of ownership in, of searching for, mining and disposing of, minerals, are hereby vested in the President on behalf of the Republic."<sup>114</sup> This right entrusted by the people to their President, overrides any other rights, titles or interest which any person may claim to possess in or over the soil in, or under which the minerals are found (Section 3 (2)). The President, therefore, being the Head of the Zambian State, in his functions and duties exercises the country's economic sovereignty.

As regards the acquisition of rights and interests, and the restrictions relating to them, the Zambian Mining Act provides that rights of searching for, mining and disposing of, minerals may be acquired and held under and in accordance with the provisions of this Act. Restrictions on the acquisition of mining rights as provided by section 5 (1) are that no mining rights shall be granted to or held by an individual who is under the age of eighteen years, is not a citizen of Zambia, or

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114. See Zambia: The Mines and Minerals Act, p.12; Mining Journal, Vol.262, No.6723, 1964, "Southern Rhodesia looks at the Mining Industry", p.501.



has not been ordinarily resident in Zambia for the prescribed period or is or becomes an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any written law.

In the case of restrictions of mining rights to companies, no mining rights shall be granted to or held by a company unless, in the case of a mining licence, it has been incorporated under the Companies Act; or when the company is in liquidation.

The mining industry of Nigeria is growing rapidly. The country is engaged in a large scale programme of industrialisation. Like every African country which is undergoing this process of industrialisation, Nigeria has to update its national legislation to be in keeping with the demands and challenges of industrialisation. Realising the need and importance of utilising natural resources including minerals, the Federal Government in Nigeria have embarked on a policy and practice of mineral by mineral legislation.<sup>115</sup> This is to say that mining laws regulate specific mining activities relating to the mining of a specific mineral. For example, the Diamond Trading Decree of 1971, Decree on the Establishment of the Nigerian Mining Corporation of 1972; and the Nigerian National Oil Corporation

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115. See for example the Laws of the Federation of Nigeria and Lagos, published in the Federal Government of Nigeria Official Gazettes, between 1959 and 1980. Some of these laws are examined below in this subsection.

Decree of 1971<sup>116</sup> and similar laws. All these Decrees as we can see are to regulate specific mining activities, and this point is illustrated below.

In the Diamond Trading Decree<sup>117</sup> there are provisions regulating the selling and buying of diamonds; restrictions on the import and export of diamonds; the issue of a diamond dealer's licence; the books to be kept by licenced diamond dealers; powers of search; action in the event of unlawful possession of diamonds; forfeiture of diamonds without an apparent owner; who may institute proceedings; penalties; jurisdiction of magistrates; claims to forfeited diamonds etc.

Section (1) of this Diamond Trading Decree provides that without prejudice to any transactions which may have been previously approved in writing by the Chief Inspector of Mines, and in so far as the conditions (if any) attached to such an approval have been complied with, only authorised diamond miners or licenced diamond dealers shall sell any uncut diamond. Paragraphs (a) to (e) of section (1) of the Diamond Trading Decree define the legal rights of persons who may engage in the selling and buying of the uncut diamonds.

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116. See the sources of materials relating to the three Decrees mentioned above, which are cited below where the provisions of each of the Decrees are examined.

117. See Nigeria: Decree No.55, Diamond Trading Decree 1971, published in The Official Gazette No.64, Vol. 58, December 31, 1971; Mineral Trade Notes, Vol.69, No.4, April, 1972, pp.5-12; Mauritania: New Investment Code and Mining Possibilities, in Mineral Trade Notes, Vol.50, No.2, February 1960, pp.26-30; Mining Journal, Vol.263, No.6737, 1964, "Risk Capital in African Countries", p.237.



According to section (2) the Chief Inspector of Mines may by endorsement on the licence impose such conditions as he thinks fit. Thus the holder of the licence must comply with the conditions on his licence in conducting his diamond business. The Decree is silent as regards the question of whether only Nigerians or both Nigerians and any other foreign persons can be holders of the uncut diamond mining and dealer's licence. Nevertheless this silence does not suggest that the Nigerian Federal Government is indifferent to the question of the nation's economic self-determination, especially as regards the role of individual Nigerians' participation in mining investment and development. According to section (7) of the above Diamond Trading Decree, the Federal Government through its Chief Inspector of Mines may revoke a licence issued, if the holder is convicted of an offence under this Decree or the regulations made thereunder or commits a breach of any of the conditions of the licence except that, on the revocation of a licence, the Chief Inspector of Mines may refund such part of the fee paid for the licence as he thinks just.

Another major legal effort by the Nigerian Federal Government to exercise the promotion of the State's economic sovereignty is the passing of Decree No.39. This Decree concerns the Establishment of the Nigerian Mining Corporation.<sup>118</sup> The Federal Military

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118. See Nigeria: Federal Government Official Gazette, Vol.59, No.54, November 2, 1972; Mineral Trade Notes, Vol.70, No.6, June 1973, pp.8-19; M.S. Aeta-Otaiba, OPEC and the Petroleum Industry, (London, 1975).

Government decrees that there shall be established a body by the name of the Nigerian Mining Corporation. The Corporation will be a government body which shall consist of government and non-government officials. Its Chairman shall be appointed by the Commissioner of Mines. Other members of the Corporation shall be the Permanent Secretary, Federal Ministry of Finance, or his Deputy; the Permanent Secretary, Federal Ministry of Economic Development and Reconstruction, or his Deputy; the Director of Mineral Resources, Federal Ministry of Mines and Power, or his Deputy; the General Manager of the Corporation; and three persons appointed by the Commissioner on the basis of their necessary ability, experience specialised knowledge of the mining industry or their business or professional attainments, who would make a special contribution to promote the activities of the Corporation. As regards the functions of the Corporation, it shall have power to do anything which in its opinion is calculated to facilitate the carrying out of among other, activities described under sub-paragraphs (a) to (h) of paragraph (5) of the Decree.

In cases where land is required by the Corporation for its use, when there is a hindrance to the acquisition of such land, the Commissioner of Mines, on the application of the Corporation and after such inquiry as he may think fit, may declare that the land is required for the service of the Corporation. When such a declaration is made, the land shall be deemed to be required for a public purpose



within the meaning of the Public Lands Acquisition Act. Under that Act the Head of the Federal Government may cause action to be taken for acquiring the land for governmental use. When the Head of State is satisfied that the land so required has been acquired lawfully, he may vest it in the Corporation by means of a certificate under the hand and seal of the Chief Federal Lands Officer.

Should there arise any controversy or the need for compensation (if any) to be paid in relation to the acquired land, the Federal Government shall pay the compensation, but the Corporation shall refund to that Government any compensation so paid and any incidental expenses incurred by the Government, section 13 (5).<sup>119</sup>

Objective analysis of the Decree on the Establishment of the Nigerian Mining Corporation<sup>120</sup> should enable us to consider that because of the legal framework under which the Corporation operates, in view of the point that the Nigerian law governing the utilisation of mineral resources is one that directly or indirectly stresses the need and necessity for the country to attain economic self-determination, the provisions of this decree as discussed above are therefore related to the mining law provisions as a major method of exercising economic independence.

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119. See Ibid., p.14.

120. See Nigerian National Oil Corporation Decree. 1971, Suppl. to Official Gazette, No.21, Vol.58, 22 April, 1971, Part A.

Other basic laws regarding the exercise of economic independence by Nigeria are the laws governing the Oil Concessions. The first ever legislation on oil was the Mineral Oil Ordinance of 1914<sup>121</sup> which was amended in 1925 and the first ever concession granted to Shell-BP was by virtue of this legislation.<sup>122</sup>

After attainment of self-government, Nigeria gained the power to legislate on matters affecting its economic self-determination. There was the Mineral Oil Act and the Regulation and Declaration under it;<sup>123</sup> the Petroleum Profits Tax Act, 1959;<sup>124</sup> the Oil Pipeline Act, 1965;<sup>125</sup> the Petroleum Decree, 1969;<sup>126</sup> and the National Oil Corporation Decree, 1971.

The mining industry is of great economic significance to most African countries. Mining contributes a considerable amount of cash in export earnings to such countries like Zambia, Zaire, Nigeria, Libya, Algeria, Angola, Zimbabwe, etc. This is just to name a few countries. Because of the importance of mining to most

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121. See Nigeria: Official Gazette No.17,1914, concerning the Mineral Oil Ordinance.

122. See Nigeria: Official Gazette No.1, 1925, concerning the Amendment of Mineral Oil Ordinance of 1914.

123. See Nigeria: Laws of the Federation of Nigeria and Lagos (Revised Edition) 1959, Chapter 120, in The Federal Government Official Gazette, No.76, 7 December 1959, as modified by Government Notice No.578, published in The Federal Government of Nigeria Official Gazette, No.26, 30 March, 1960.

124. See Nigeria: Decree No.15 of 1959, in Suppl. to the Official Gazette No.26, Vol.46, 30 April 1959 Part A.

125. See Nigeria: Decree No.18 of 1965, in Suppl. to the Official Gazette No.94, Vol.52, 8 December 1966 Part A.

126. See Nigeria: Decree No.51 of 1969, in Suppl. to the Official Gazette No.62, Vol.56, 27 November 1969, Part A. On general Nigerian business policy, see J.F. Donovan, "Nigeria after Indigenisation: Is there any room for the American businessman?", in International Lawyer, Vol. 8, No.3, 1974, p.600.



African countries, mining legislation is therefore of great significance in the regulation of economic activities in this vital economic sector. As the mining industries of African countries expand, so will the mining legislation expand. Most mining laws in Africa do take into account the economic and investment interests of the multi-national corporations and foreign companies conducting economic activities in the respective countries. In return, multi-national corporations and foreign companies operating in the mining industry of an African country are required to conform to the mining and other laws of the host State.

#### 6. Mining Agreements

Another method of exercising economic self-determination through utilisation of mineral resources is by employing mineral agreements or concessions.<sup>127</sup>

The signing of international mining agreements introduces foreign elements into the business of utilising mineral resources of a given African country. This foreign participation entails many types of interaction between the host State and the foreign enterprises. Consequently,

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127. See P. Fischer, A Collection of International Concessions and Related Instruments, in 2 volumes, (N.Y., 1976); D.N. Smith, & L.T. Wells, "Mineral Agreements in Developing Countries: Structures and Substance", in American Journal of International Law, Vol.69, 1975, pp.560-90; Nigeria and Algeria: Oil Solidarity?, in African Development, No.18, 1975, p.5; American Journal of International Law, Vol.67, 1973, "Mining the Resources of the Third World: From concession agreements to service contracts", p.227; R.N. Cariepy, "International Commodity Agreements: Coffee, Tin, and Cocoa", in International & Comparative Law Quarterly, Vol.25, 1976, pp.677-684; K.R. Khan, "The Development of the Tin Buffer Stock System: Diplomatic and Organisational Study of the Pre-1945", in I.J.I.L., Vol.17, 1977, pp. 297-325.

a vigilant and sustained effort is required to narrow the divergence between the aims of the two parties and to foster a climate of mutual understanding.

In fact, before embarking on an attempt to reach an agreement or concession, it is important to negotiate a deal which will not allow the erosion of the host State's sovereignty in relation to the use of its mineral resources. One has to bear in mind that the more these foreign companies or firms have at stake, the more difficult it becomes for them to retreat. The agreement or concession must take the form of a complete package covering all areas of mutual interest and advantage. The concessions, agreements or conventions usually go before the legislature and become laws of the country concerned.

In February 1969, an agreement was reached between Zaire and Belgium over interests and control of Union Miniere. This agreement on technical co-operation, is in the form of a convention, which states:

Société Générale des Minerais (S.G.M.) would provide managerial recruitment and other technical services for Générale Congolaise des Mines (GECOMINES), and GECOMINES' output of copper, cobalt mineral and metals in the world markets. In effect this agreement provided that Zaire Mines could continue to operate under Belgian Management much as before nationalisation.<sup>128</sup>

The Zairen Government though anxious to attract foreign investment in the mining industry, in most cases requires equity of participation in the mining enterprises.

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128. See Pearson, Commodity Exports and African Economic Development, loc. cit., above.



In 1969 an agreement was reached between the Government of Zaire and the foreign mining companies.<sup>129</sup> The agreement provided for changes in the structure of the mining industry as a result of government participation.<sup>130</sup> The Zairen Government, indicating its intention to participate in any new mining developments, announced that "All rights of ownership or partial ownership of minerals must revert to the State".<sup>131</sup> Thus the right of ownership of minerals by private foreign or national enterprises is forbidden by law. This agreement contains sections on provisions concerning assets, price, payment, period of payment, acceleration of payment, management and sales agreement, non-mining assets, taxation and dividends. The agreement also provides for possibilities and encouragement of the establishment of new mines and mineral developing in general. It suggests replacement of the royalty and export tax formula by a profit-based mineral tax.

There is a focus on some of the factors that could influence or encourage the decision of any foreign

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129. See Congo Kinshasa: A Convention of Technical Cooperation between Générale Congolaise des Mines Kinshasa, and the Société Générale des Minerais, Brussels was concluded in Kinshasa in February, 1967.
130. Prior to the nationalisation of Union Minière's properties in the Congo in 1967, the Congolese Government was actually the largest equity shareholder with (17.9%) of the shares. At the time of nationalisation the government shares rose to 50%.
131. Société Générale des Minerais (S.G.M.) was the Union Minière's marketing agent before the nationalisation, and is a part of the large Belgian group, Société Générale de Belgique. Union Minière, also a Belgian Company has mining interests throughout the world, including Canada, Australia and Iran.

investor to invest in the Zambian Copper Mines, namely: (a) the existence of unexploited ore-bodies; (b) the post-tax profits on production and therefore: (1) cost of production, (2) tax liabilities, (3) the ability to remit funds and (4) the availability of investment funds.<sup>132</sup> By implementing and applying the agreements, the Zambian government's main objective and desire is to strengthen and sustain a very big mining industry, with the eventual aim of building an economically independent Zambia.

On the 23rd October, 1967, Morocco and Hungary signed a "Mineral Exploitation Agreement"<sup>133</sup> under whose terms Hungary will supply part of the mining equipment and make the necessary installations. Obviously, the two countries would enjoy the mutual benefits the agreement brings, within the period it covers.

After Mr. J. Hasegawa, the leader of the Japanese Economic Co-operation Investigation Mission to West Africa, had conferred with President Bokasa of the Central African Republic in 1969, a memorandum was signed in 1970.<sup>134</sup> It concerned Japanese co-operation in the development of the Central African Republic's uranium mines. Later, on the basis of co-operation between the two countries, agreements were reached providing for the development of mineral resources by Japanese companies.

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132. See Mineral Trade Notes, May 1970; Zambian Mines and Minerals Act, 1969, op.cit., above.

133. See Mineral Trade Notes, Vol.65, No.2, February 1968, p.36.

134. See Mineral Trade Notes, Vol.67, No.6, June 1970, p.27.



An Agreement on Commercial and Economic Co-operation<sup>135</sup> was concluded between the United Kingdom and Cameroon on 29 July, 1963. It contained a number of provisions with relevance to various aspects of the topic of permanent sovereignty over natural resources. In it there are also provisions relating to the promotion of the mining industry of Cameroon. These come under various headings such as protection of investments; expropriation; operation of enterprises; settlement of disputes arising out of the interpretation or application of the provisions on protection of investments and expropriation.

Article V (1) which concerns protection of investments provides:

Within the framework of national legislation in force on the date of signing this agreement relating to investment, each Contracting Government shall accord to investments, real property, rights and interests owned by, or held indirectly by, nationals, concerns, associations or companies of the other country in its territory fair and equitable treatment.

The question of operation of enterprises is dealt with under Article VII stipulating that: "Each party undertakes to accord of its laws and regulations, the legal protection necessary to ensure their secure operation".<sup>136</sup>

There are numerous of these international mining agreements between African countries and foreign companies and firms, so many indeed, that it is not within the scope of this work to discuss them all. However, it

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135. See Cameroon - U.K.: Agreement on Commercial and Economic Co-operation, loc. cit., above; Mezerik, Natural Resources, Restrictions, Regulation and Agreements, p.42, loc. cit., above.

136. See Cameroon - U.K.: Agreement on Commercial and Economic Co-operation, Art. VII, op.cit., above; Mezerik, op.cit., p.42.

is hoped that a general outlook and framework of understanding has been provided which should give the reader the basis for comprehending some of the legal problems that may arise or be covered by an international mining convention, agreement or concession.

Some salient points may, however, be deduced from the above analysed legal provisions. What has been made clear by those provisions is the following:

1. All these mining law provisions reveal the determination of most African States to exercise their economic sovereignty by way of either passing mining legislation or by concluding international mining agreements with foreign investors.<sup>137</sup>
2. The provisions define the legal rights and obligations of all those who are engaged in mining investments, be they nationals or foreign investors. The provisions clearly underline what the law expects of the investors.
3. The provisions define the rights of investors to acquisition of mining rights and interests. They lay down the conditions under which a mining licence may be granted by the authorities.
4. But the mining law provisions also lay down restrictions concerning the acquisition of mining rights. They provide for the administration to impose such mining restrictions on companies operating in the country as it may deem necessary.

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137. See Moroccan- Hungarian Mineral Exploitation Agreement, October 20, 1967, Mineral Trade Notes, Vol.67, No.2, February 1968, p.36; Ibid., Peru, New Mining Investment Bill, November 23, 1967, p.36; Ibid., Central African Republic - Japan: Agreement concerning Uranium Mining, July, 1970, Mineral Trade Notes, Vol.67, No.6, June 1970, pp.27-8; Mining Journal



5. As regards the question of ownership of the mineral resources, the mining law provisions explicitly stipulate that title to mineral resources belong to the State. Thus no private individual under the laws may claim ownership of mineral resources. These resources are simply declared public utility.

6. It has also been made quite clear under certain mining law provisions that foreign investment may not be permitted to operate in certain sectors of the mining industry, especially where national investment can operate bringing maximum profits out of such operations. The national investors are protected under the law from competing with foreign investor counterparts.

#### 7. Agricultural legal provisions

In this section we discuss and analyse some of the agricultural laws in Africa with a view to showing how African agricultural laws<sup>138</sup> are applied and used for the purpose of exercising State economic sovereignty.

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137. Continued .....

Vol.263, No.6728, 1964, "Co-ordination of Development Aid", p.73; Ibid., No.6737, "Risk Capital in African Countries", p.237; Ibid., No.6738, "Mining in Equatorial Africa", p.259; Idem., Vol.262, No.6723, 1964, "Southern Rhodesia looks at the Mining Industry", p.501.

138. See as an example, United Arab Republic of Egypt: Decree-Law prohibiting foreign ownership of Agricultural Land, January 19, 1963, in I.L.M. Vol.2 1963, p.488; Tanzania Nationalisation Laws: National Agricultural Products Board (Vesting of Interests) Act, 1967, in I.L.M. Vol.6, pp.1194-1227; Tunisia: Act, No.67-17 providing for State encouragement of agricultural development, in U.N. Food and Agricultural Legislation, Vol.XIII, No.3; Indonesia: Decree on Control of American rubber companies, issued on February 26, 1965, in I.L.M. Vol.4, 1965, p.450.

In order to avoid any claims which might come from constitutionalists who may be inclined to associate agricultural laws solely with constitutional rather than international legal problems, a distinction between the two legal aspects is made by way of explanation in this subsection below.

But before entering into a discussion of the contents of the present section, it is essential to explain the meaning of certain concepts closely related to our subject-matter. One has to explain the meaning of primary commodities and agricultural products in the context of the two terms being related to economic self-determination and utilisation of natural resources, agricultural resources included.

Principal primary commodities are those commodities which are produced by the chief or primary industries and are mainly exported to the international market. To mention but a few, agricultural principal primary commodities exported by some African countries are: coffee, cocoa, cotton, tea, sugar, tobacco, sisal etc. Primary agricultural industries are those which produce foodstuffs and raw materials by agriculture, in the form in which these products are first exchanged internationally. Agricultural primary commodities<sup>139</sup> include both vegetable and animal products, while vegetable products cover both ordinary crops and arboreal or tree crops such as rubber, sisal and copra.

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139. See Havana Charter, 1948, Doc. E/CONF. 2/78, where Art. 56 Primary Commodity is defined as "any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade".



Despite the fact that primary commodities<sup>140</sup> are traded internationally in very large quantities, the value in world export of many of them is very small. This is so in relation to the important exported commodities. But to the particular importing or exporting country, even the less important commodities remain of considerable importance. It may be so in the case of cereals, rice and maize, or various spices.

Another question which needs clarification before discussion of the subject-matter is that of the structure and organisation of agricultural products in African countries. Broadly speaking, there are two very different types of agricultural production units, for the products of tropical and sub-tropical areas, namely the plantation or estate and the smallholding of the peasant proprietor.

It is noted that the difference between the two production units is a product of the particular commodity being able to be handled efficiently by the given type of farming - plantation or estate; or smallholding peasant farm.<sup>141</sup> Handling of production in any one of

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140. See R.B. Bilder, "The International Coffee Agreements 1962", in The American Journal of International Law, Vol.57, 1962, pp.888-892; I. Smith, "Structures and Policy changes in World Sugar", in Journal of World Trade, Vol.11, No.3, 1977, p.228; African Development Vol.1, No.3, 1966, "Commodities Report", p.25; Idem., Vol.2, Feb.1969, "The Cocoa Fluctuations", p.24; Ibid., March 1969, "Copper and Sugar", pp.28-9; A. Law, International Commodity Agreements settling Performance and Prospects, (Lexington, 1975); Rowe, J.W.F. Primary Commodities in International Trade, (Cambridge, 1965); Baisenko, A. and Shamrai, Y. "World Economy and Rice Policy", in International Affairs, (Moscow, 1976), pp.176-84.

141. See U.N. Food and Agricultural Organisation: "Main issues in Agricultural Commodity", (Rome, 1972); Idem., Commodity Bulletin Series, No.33, (U.N. Rome, 1961); U.N. Economic Commission for Africa, Agricultural ...

the units has to take into account capital investments and the labour force. A large plantation or estate will need great capital investment and will employ a great deal of man-power including probably hired labour, whereas the smallholding peasant farm does not require a large labour force or capital investment. In the majority of cases, the smallholding farmer will seek to cultivate or grow a commodity that will go into the market within the shortest possible period of time. Those crops which will take a long time to handle, such as tea, sisal, etc., are grown by plantations or estates. Such products may be handled by plantations or estates because they require a special kind of treatment and care involving a certain degree of technical knowledge and skill. Since it is the Europeans who introduced most of the agricultural export commodities to Africa, they brought with them the necessary technology and technical skills.

The smallholding peasant farms typically grow rice, vegetable oilseeds (copra, palm oil, palm kernels, and groundnuts), cocoa and jute. Typical of the mixed

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141. Continued.....

Economic Bulletin, No.8, 1966, "Economic Appraisal of Agricultural Development Projects: The Tanzania Village Settlement Scheme", p.36; Idem. No.1, 1962, "Commodities: Sugar production in Ethiopia", p.2; Id., No.11, 1969, "Agricultural production, productivity and investment in African Countries", p.26; id., No.2, 1963, "Irrigation: Summary Report on irrigation schemes in Africa", p.2.



plantation and smallholding industries are cotton, coffee, sugar and rubber. Most African countries are ever increasingly endeavouring to find the most rational, suitable and profitable ways of organising production units in their agricultural industries so as to bring them into line with the economic demands for self-determination and prosperity.<sup>142</sup>

It is essential to fully understand the colonial nature of the background to African economies if we are to grasp thoroughly the economic influence involved in the organisation of both plantations and smallholding peasant farms and the laws that regulate the relations within the agricultural industries.

When the colonial powers established their authority in any African country they introduced certain agricultural crops, and agricultural production units and to encourage the production of these crops they encouraged the European-run plantations to the exclusion of the smallhold unit. The Europeans dominated the plantation or estate production unit, due to availability of cheap

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142. See U.N. Economic Commission for Africa publications: e.g. Economic Bulletin for Africa, Vol.3, 1963 B1, "Industrialisation and Economic Planning"; Idem. Vol.4, 1964, B1, "Co-ordination of development plans in Africa"; Id., Vol.5, 1965, (a) Raw Materials, (b) "the Economic Development of Zambia". See also references given on the economic development of individual countries, in the bibliography entries in this thesis below; U.N. Agricultural Economic Bulletin for Africa, No.11, 1969, "Agricultural production, productivity and investment in the development plans of East African Countries"; Id., No.2, 1963, "Irrigation: Summary Report on irrigation schemes in Africa", p.2.

African labour and with the help of financial credit facilities open to them from the colonial government: the African peasant farmers, lacking this second opportunity, led a continuous smallholding peasant existence. Thus the smallholding peasant production unit was dominated by small-scale African farmers who were deprived of all the agricultural developmental opportunities and facilities which the colonial government offered to the Europeans. In Namibia and South Africa only the Africans are engaged in the small farm production unit because the colonial government in these countries adhere to a policy of promoting the European farmer by providing him with special financial arrangements or benefits. This kind of domination by European large estate farmers is common for all African countries where colonial governments have ruled.

The colonial governments also introduced favourable laws to enforce their policies, in the interest of the Europeans, and as in this case, the interests of Europeans were those of large plantation farmers.

With the dynamic and progressive development of nationalist liberation movements throughout Africa, the colonial governments lost political control of the majority of African countries and new national governments have been established.

As political independence was gained, new nationalistic laws were introduced, including those governing the agricultural industries. In all African countries,



agricultural laws constitute one of the vital and basic legal methods of exercising economic self-determination.

It becomes essential for the new African governments to resettle the majority of the population which, during the colonial rule, was deprived of adequate land and other agricultural facilities which enable normal and profitable agricultural development. Hence the new government embarks on a new and progressive agrarian reform. It is in the process of introducing these agrarian reforms that new agricultural laws are formulated as a means to regulate the relations in a more sustained agricultural industry which will form the basis for national industrialisation. Any African government's agrarian reform must provide for the redistribution of the land to the smallholding African farmers who, as has already been pointed out, form the greater percentage of agricultural productive forces and produce more agricultural products than the plantation or estate farmers. Consequently, within the framework of such an agrarian reform, the smallholding peasant proprietors will continue to form the basic producers of exports, principally primary agricultural commodities.

Agricultural laws passed within the framework of agrarian reforms vary in description and form from country to country.<sup>143</sup> This variation can be shown by

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143. See M.F. Lofchie, "Agrarian socialism in Third World: the Tanzanian Case", in Comparative Politics, Vol.8, 1976, pp.479-499; M.Wheeler, "Kenya's Agricultural Breakthrough", in African Development, Vol.2, No.5, 1968, pp.28-9; S.Pohoryles and A. Sheskin "Land and Economic Growth in Africa", in U.N. Food and Agricultural Land Reform, Land Settlement and

analysing a few of the instances of agricultural legislation or Acts of Parliament enacted by some African countries.

Under colonial rule the large plantations or farms we talk about here were owned by foreign Europeans who either lived in the particular colony, or abroad, while exercising property rights over the farms in the colony. Some or most of such European farmers would prefer to give up ownership of the farms or plantations when an African country attains political independence. Thus such action does create an international legal problem in connection with property of peasants who are nationals of States other than the host State. This means that when a new independent African government tackled the property problems involving those foreign nationals, and because of the fact that those large plantations or farms constituted a very large portion of the total agricultural land in most African countries, their agricultural laws or related provisions had to be so formulated as to cover the regulation of such kinds of foreign investment. But of course, one would not have expected the African governments to have provided special laws concerning only large European plantation farms.

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143. Continued .....

Co-operatives No.1, 1975, pp.38-71; H. Mapondera, "Ploughing money into the land: A review of small farm credit and development", reviewed by J. Vasthoff in African Development, August 1969, pp.15-16; F.M. Mifsud, "Customary Land Law in Africa", in U.N. Food and Agriculture Organisation, (Rome, 1967).



In 1962 the Farm Lands (Protection) Act was passed in Ghana.<sup>144</sup> The main objective of the Act is to protect farmers whose titles to land are defective. This, according to section 1 of the Act, means that protection is accorded to any person referred to as a farmer, who has acquired land for the purpose of farming. If a farmer does not farm part of his land or the whole of it for a period of eight years from the date of acquisition, his title to the whole land or that portion that has not been farmed shall be deemed for all purposes to have been eradicated. Section 2 (1) talks of the case "where a farmer has, in good faith, at any time after the thirty-first day of December, 1940 and before the commencement of the Act, acquired any land by customary law or otherwise and has begun farming the land for eight years from the date of acquisition, the Act shall confer valid title on such land". The Act goes on to state that such title on the land shall be valid provided the land has not been farmed by any other person for a period of eight years prior to the acquisition by the present farmer.

In our opinion it is clear here that sections 1 and 2 of the Ghana Act are protecting the smallholding farmers by taking land from the large foreign farm proprietors who, by virtue of not being able to utilise the whole or part of the land they own, forfeit this land which is given by the government to those who

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144. Ghana: The Farm Lands(Protection) Act, 1962 in U.N. Food and Agricultural Legislation, Vol. XI, No.1, 1962: S. Pohoryles and A. Sheskin, "Land and Economic Growth in Africa", op.cit. above.

cultivate it - smallholding African farmers. When section 2 talks about conferring of title to land acquired after 1940,<sup>145</sup> under African customary law, this is an attempt to protect the African smallholding farmers who could acquire land as a community of individuals for purposes of use. It is thought the African smallholding farmers who had been utilising the land during the colonial period since 1940, should continue and in fact gain title to this land. They did not have this land title before Ghana gained political independence.

The Kenya Land Control Act of 1967,<sup>146</sup> constitutes part of the agricultural law of the country. The Act provides for the control of transactions in agricultural land. The Act deals with such questions as the sale, transfer, lease, mortgage, exchange partition or other disposal of, or dealing with, any agricultural land that is situated within a land control area. The land control area is an area to which the Minister concerned has applied the Act. Other areas where self-determination in terms of land control is applied are the granting of consent in respect of controlled transactions, setting up provincial land control appeal boards, central land control appeal boards, etc. All these

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145. Since Ghana attained its political independence in 1957, "any time after the thirty-first day of December 1940" (as referred to in section 2 of the Farm Lands (Protection) Act of 1962) means the period when Ghana was under colonial rule.

146. See Kenya: Act No.34 of 1967: The Land Control Act 1967, in U.N. Food and Agricultural Legislation, Vol. XVII, No.2, 1967.



agricultural control measures taken by the government of Kenya under the above mentioned Act, are deemed to be methods of the exercise of economic sovereignty. Such legal control measures are also tacitly directed against foreign investors, under the assumption that the law is applicable to acquisition of land by foreigners.

As one of the major legal methods of exercising economic sovereignty, the Tunisian Parliament in 1963 passed Act No. 63-17, providing for "State encouragement for agricultural development".<sup>147</sup> Chapter 1 of the Act deals with conservation of the national agricultural patrimony and improvements to agricultural land. While Chapter 2 is devoted to State encouragement for developing the productivity of cultivated land, Chapter 3 provides for State encouragement for rural housing and rural construction.

Chapter 1, Article 1 stipulates that:

Zones may be established for the execution of works for soil and water conservation and for the intensification of agricultural operations, when agricultural or collective holdings, population centres or public works are endangered by seepage, floods or erosion, or when the potential of an agricultural region is not being fully exploited for lack of land improvement measures.

It is noticed here that the law provides for the proper utilisation of agricultural land. Part (2) of the same Article states as follows:

Prior to the establishment of such zones, the administration shall proceed to carry

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147. See Tunisia Act of Parliament, op.cit., n.128 above; H. Tristram, "Botswana's £1 million Agricultural Development Scheme", in African Development, Vol. 1, No.11, 1967.

out an investigation intended to determine precisely the danger to the patrimony or the inadequacies in the use of the agricultural potential, and the methods to be adopted to remedy the said conditions.

After the government<sup>148</sup> has established the need to create an agricultural zone, it organises associations of collective interest, the professional organisations of landowners and the landowners affected by the works referred to in the preceding Article, into agricultural development associations. This action may be taken either at the initiative of the Secretary of State for Agriculture or at the request of one or more members of the group. The agricultural development associations have the responsibility of promoting the joint or individual execution of works for soil and water conservation; drainage, organisation of irrigated zones; creation of bush plantations, prairies and pastures; and grazing strips in areas where there is a need for this. The associations shall further have as a duty the promotion of modernisation of agriculture within their area. They shall do this through extension of work on farming methods of all kinds suitable for agricultural development and production. Furthermore, it

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148. The Government of Tunisia, and indeed a few other governments have entered into agreements with the Government of the United States of America. These agreements concern the sale of commodities. See for example agreements between: Tunisia - U.S., 24 December, 1968, concerning Sales of Agricultural Commodities, in U.N.T.S., Vol.714, p.105; Sierra Leone - U.S., Agreement for Sale of Agricultural Commodities, 18 August, 1971, in U.N.T.S., Vol. 807, 1972, p.41; Liberia - U.S., Agreement for Sale of Agricultural Commodities, 23 October, 1967, in U.N.T.S., Vol.701, p.91; Guinea - U.S. Agreement for Sale of Agricultural Commodities, 18 October, 1967, Ibid., p.65; Ghana - U.S., Agreement for Sale of Agricultural Commodities, 10 December, 1968, in U.N.T.S., Vol.714, p.3.



shall be the duty of the association to promote the income of the population groups concerned and for improving the standard of living thereof.

Article 8 stipulates that State assistance may be granted to operations for developing the productivity of cultivated land, especially in respect of increasing the fertility thereof; crop protection; improvement of animal productivity and veterinary care; utilisation of selected seeds; acquisition of new equipment, or repair of used equipment, within the framework of the mechanisation of agriculture as provided for in the development plan. The assistance from the government may include subsidies to farmers for the execution of the operations; the granting of long-, medium-, and short-term loans and seasonal loans for the same operations by the competent farm credit agencies.

Legislation which may be interesting for our analysis is the Zambian Lands Acquisition Act of 1969 which makes provision for compulsory acquisition of land and other property. According to part II, Article 3 of this Act, the President of Zambia may, whenever he finds it desirable or expedient in the interests of the Republic so to do, compulsorily acquire any property of any description. Other than in the interests of the Republic the Act does not describe any specific purposes or uses for which the property or land may be acquired compulsorily. Article 4 (1) provides that whenever it appears to the President that it may be desirable or

expedient to acquire any land it shall be lawful for any person authorised generally by the Minister for that purpose either:

- (a) to enter upon the land in question ... and survey and take levels of such land; or
- (b) to dig or bore under the subsoil; or
- (c) to do all other acts necessary to ascertain whether the land is or may be suitable for the purpose in question; or
- (d) to clear, set out and mark the boundaries of the land proposed to be acquired and the intended line of the work (if any) proposed to be done thereon.....<sup>149</sup>

Again we should understand that tacitly this Zambian Act includes the acquisition of land from foreign European landowners or farmers, thus the Act covers or safeguards the rights of foreigners who own land in Zambia. It becomes clear that the foreign element's right, though not actually mentioned, is in fact implied in the Act. Moreover, the Act provides, as will be shown below, for payment of compensation to the owner of the land or property that is nationalised. This means that compensation is paid for the nationalised land or property of either the foreigner or national without discrimination. Articles 10, 11, 12, 13 and 14 are all devoted to the question of payment of compensation to the owners of the property or land so compulsorily acquired by the government.<sup>150</sup>

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149. See The Zambian Act No.2 of 1970: The Lands Acquisition Act, 1969, in U.N. Food and Agricultural Legislation Vol.XIX, No.2, V/Ic, (Rome, December 1970).

150. See also the Zambian Government Gazette, Vol.VI, No.5, January, 1970, supplement: "The lands Acquisition Act, 1969"; G. White, Nationalisation of Foreign Property, (London, 1961).



Under Article 10, compensation is paid:

where any property is acquired by the President .... the Minister shall on behalf of the Government pay .... compensation in money as may be agreed or, in default of agreement, determine in accordance with the provisions of this Act: and

where property acquired is land the President may, with the consent of the person entitled to compensation, make to such person, in lieu of or in addition to any compensation payable under this section, a grant of state land not exceeding in value the value of the land acquired, for an estate not exceeding the estate acquired and upon the same terms and conditions, as far as may be practicable, as those under which the land acquired was held.

Should there arise a dispute relating to or in connection with the property, other than a dispute as to the amount of compensation, the Minister or any person claiming any interest in the property may institute proceedings in the Court for the determination of such a dispute. In cases when any dispute arises as to the amount of compensation the Minister or any person claiming to be entitled to compensation may, if the dispute is not settled within six weeks refer it to the National Assembly which shall determine the amount of compensation to be paid. Compensation determined by the National Assembly shall be final and the dispute cannot then be taken to any court on the grounds that compensation was not adequate.

Part IV of the Zambian Act deals with the question regarding unutilised, underdeveloped land of absentee owners. Under Article 15 (1) no compensation shall be paid in respect of underdeveloped or unutilised land. Land shall be deemed to be underdeveloped or

unutilised if it is inadequately developed bearing in mind in particular the national need.

Most interesting is Article 16 which describes absentee owners, who in the event of acquisition of their claimed property lose compensation. The Article provides:

an absentee owner ... means, as applied to the owner of any estate or interest in or right over land or other property -

(a) .... an individual, a person who is not ordinarily resident in Zambia;

(b) .... a partnership, a co-ownership or a body corporate, one in which the effective control lies, directly, in the hands of individuals who are not ordinarily resident in Zambia.

Attention is here given to the analysis of the Tanzanian Government National Legislation in the agricultural industry and in particular to analysis of the Sisal Industry Act of 1969.<sup>151</sup> The Act which is divided into VII Parts, deals with such questions regarding the establishment of the Tanzanian Sisal Board as vesting of interests in the Board; marketing and export of sisal; administration and financial matters etc.

According to section 5, the functions of the Board shall be to promote the development and improvement of the sisal industry; control of the marketing and export of sisal; and advise the Government of all matters affecting the sisal industry.

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151. See The Tanzania Sisal Industry Act, 1969, in Gazette of the United Republic of Tanzania, No.45, Vol.1, dated 17th October, 1969, (printed by the Government Printer, Dar-es-Salaam, October, 1969); Lofchie, "Agrarian socialism in Third World: the Tanzanian Case", Loc. Cit., n.143, above; Tanzania Nationalisation Laws, loc.cit. ; U.N. Agricultural Economic Bulletin for Africa, No.8, 1966, "Economic Appraisal of Agricultural Development Projects: The Tanzania Village Settlement Scheme", p.36, op.cit.above.



In order to effectively promote the development of the sisal industry, the Board, subject to any special or general directions of the Minister concerned, is empowered:

- (a) to control and fix the prices to be paid from time to time for sisal which is to be exported or sold for the purpose of local industries and to notify such prices in such manner as the Board may deem expedient or requisite;
- (b) to direct the export of sisal to any special market;
- (c) to direct sisal to any specified industry in Tanganyika;
- (d) to deal with matters concerning grading, condition and classification of sisal;
- (e) to receive and consider recommendations advanced by producers concerning the production and marketing of sisal;
- (f) to allocate production quotas to sisal plantations;
- (g) generally, to give such directions to producers as the Board may deem necessary for the furtherance of its objects under the Act.

It is noticed that on one of the most important questions, namely that of the control and fixing of sisal prices, the Board is empowered to deal with the international market. Thus it may fix and control the sale of sisal to any external consumer as well as to local industries. It must be mentioned here that sisal is one of the few principal primary commodities exported internationally, outside the framework of an international commodity agreement.<sup>152</sup> Section 17 precisely provides that no

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152. Under UNCTAD Resolution 93(IV) 30 May 1976, the international community has been negotiating for an Integrated Programme for Commodities known as the "Nairobi Commodities". By virtue of being major producers of some of the primary commodities, African States have an interest in the Integrated Programme for Commodities. The main objectives of the programme are (1) to improve the terms of trade of developing countries and to ensure an adequate rate of growth in the purchasing power of their aggregate earnings from exports of primary commodities, (2) to encourage a more orderly development of world commodity markets in the interests of both producers and consumers. But in more

person other than the Board or a subsidiary company shall export sisal. To stress the importance of the sole right and duty of the Board to market and export sisal, it is an offence punishable by a fine not exceeding twelve months, or by both fine and imprisonment.

Decree No.65-200<sup>153</sup> in Togo provided for the establishment of new agricultural development companies, as the same law lays down terms for the winding up of the previously existing Public Rural Action Companies. This decree, known as the "Statutes of the Regional Land Use Planning and Development Companies" (SORAD), provided for the "creation in each region of a company operating in the public interest with mixed public and private capital". The company was to be known as the "Regional Land Use Planning and Development Company".

152. Continued.....

specific terms, the objectives of the Programme are: (1) the establishment and maintenance of commodity prices at levels equitable to consumer and remunerative to producers; (2) the reduction of excessive fluctuation in commodity prices and in the volume of trade; (3) assurance of access to markets, especially to those of developed States, for commodity-exporting States; (4) assurance of access to supplies of primary commodities for importing States; (5) expansion of the processing of primary commodities in developing States; (6) improvement of the competitiveness of natural products vis-a-vis synthetics; (7) the restructuring, or rationalisation, of marketing and distribution system. For further information, see Document TD/184, in Proceedings of the UNCTAD, Fourth Session, Nairobi 5-31 May, 1976, Vol.III, Basic Documents, (N.Y., 1978), pp.3-12; Id., Vol.1, Report and Annexes, (N.Y., 1977), pp.47-54; see also TD/B/IPC, for the Negotiations for an Integrated Programme for Commodities.

153. See Togo: Decree No.65-200 laying down the model statutes of the Regional Land Use Planning and Development Companies and establishing the terms for the winding up of the Public Rural Action Companies, in U.N. Food and Agricultural Legislation Vol. XV, No.3, 1/1, (Rome, March 1967 ).



Each company was empowered within its sphere of competence to be the executing agent of the regional plan. The main purpose of each company is to raise the standards of living of the rural population and bring about the economic and social development of the region. Such a policy is deemed to produce the results of self-sufficiency in the particular region, bringing the desired objective of attaining national economic self-determination.

As regards capital and other resources, Article 5 provides that the capital of each company shall consist of:

- 1) a grant of five million (5,000,000) francs CFA fully paid up by the State at the time of the creation of the company;
- 2) a grant of one million (1,000,000) francs CFA for each administrative district to be taken from the assets of the Federation of Public Rural Action Companies ....
- 3) movable and immovable property and liquid assets contributed by rural communities after the winding up of the Public Rural Action Company.

In the light of Article 5 cited above, it is clear that the State shall include in the capital shared out among these land development companies the assets of each Public Rural Action Company in liquidation plus the property and liquid assets contributed by the communities.

The Togolese law provides in Article 6 that the working capital of the Regional Land Use Planning and Development Companies shall consist of : (1) credits for their programmes; (2) loans which they are authorised to contract in relation to their financial standing;

(3) their own resources from subscriptions, sales, hiring of services; (4) donations and legacies. Thus the law here lays down provisions regulating how the Regional Land Use Planning and Development Companies shall organise its financial resources enabling it to conduct its normal functioning.

In the light of discussion in this chapter, it may be concluded that:

- 1) Every State has a legal right to exercise economic self-determination in accordance with national and international law. This means that a State has the right of decision in all its economic and financial matters.
- 2) The concept of economic sovereignty has gained a certain degree of international legal acknowledgement, and its legal significance is embodied in the instruments examined in subsection 2 above. Although the U.N. General Assembly resolutions are only recommendations, and do not become law ipso facto, they may become law through the United Nations practice, or through State practice.
- 3) African States have now entered the second phase of their exercise of self-determination; namely, the exercise of economic self-determination.
- 4) In exercising their right to economic self-determination, they have employed the following major legal instruments: independence economic provisions; constitutional economic provisions; investment law provisions; investment agreements; mining law provisions; mining agreements; and



agricultural legal provisions. The main aim of independence economic provisions is to lay down certain legal guarantees, with the objective of attracting investments from the former metropolitan State, and indeed, from other foreign investors.

(a) Independence economic provisions are legal directives used as guidelines by the particular African country when formulating new relevant laws after attainment of political independence.

(b) Constitutional economic provisions stipulate the legal requirement for foreign investments, especially, when these investments are conducted in the private economic sector of a particular African State.

(c) The most viable role in regulating foreign investments is played by African investment laws. These have been satisfactorily employed by African States to promote their economic self-determination.

(d) Investment Agreements concern the protection of investments of the Contracting Parties in their respective countries. This protection is seen in the contents of the agreements themselves. They provide for: capital investment, expatriation of capital profits and gains, and the right to compensation after nationalisation of investment property. While all these measures do encourage the foreign investor, they also provide for the promotion of economic independence of African States.

(e) Because of the importance of mining to most African States, mining legislation is of great significance to the exercise of their economic independence. Most mining

laws in Africa take into account the economic and investment interests of multinational corporations and foreign companies operating in the respective African country. In return, these multinational corporations and foreign companies are required to conform to the mining and other laws of the host State.

(f) Mining Agreements define the rights of investors to acquisition of mining rights and interests, and conditions under which a mining licence may be granted. They give the administration the right to impose certain mining restrictions as it may deem necessary. Under African mining laws, natural resources are declared a public utility and no private individual may claim ownership to them.

(g) In all African States, agricultural laws are one of the most vital and basic legal instruments of exercising economic self-determination. These laws were formulated as a result of agrarian reforms that took place after the attainment of political self-determination. African agricultural laws vary from country to country. They provide for acquisition of title to, sale, transfer mortgage, and lease of agricultural land. They also define agricultural lands or economic zones. Some African agricultural laws define the competent financing, marketing and exporting government agencies, as well as stipulating conditions upon which farmers may be granted credit facilities. In the event of any nationalisation of agricultural land, or property, most African laws



provide for payment of compensation, to the owner of such land or property - be they national or foreign owners.

Because of the growing international economic intercourse between States, and the enormous desire to consolidate economic power by individual African States, those major legal instruments of exercising economic self-determination will undergo a process of further re-formulation, as this would facilitate the new and emerging economic interests of both the African countries and the foreign investors.

CHAPTER 3LEGAL FRAMEWORK OF INTERNATIONALECONOMIC CO-OPERATIONSection A. Bilateral economic co-operation1. Agreements between African states

African States<sup>1</sup> enter into bilateral agreements for economic co-operation. This co-operation may be general or relate to specific projects. These agreements often come into force on signature and do not require ratification.

At the present time, a few economic commercial agreements have been concluded solely between African States. The most probable reasons for the scarcity of such economic treaty arrangements are: colonial background, need to consolidate political independence, and sub-regional arrangements among African States. Primary importance is attached to the reasons that: firstly, it was most important for these countries, after having attained political independence, to consolidate political power before embarking on economic development and reconstruction. Secondly, the African States have sought to emphasise sub-regional development as a form of economic co-operation. It is for this second reason that bilateral economic arrangements between them are

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1. See as an example, Egypt-Zambia: Trade Agreement, of 16 February, 1966, in U.N.T.S., Vol.760, p.273; Gambia-Senegal: Treaty of Association, 19 April, 1967 in U.N.T.S., Vol.640, p.101; Morocco-Senegal: Treaty of Friendship and Solidarity, of 15 September, 1966, in U.N.T.S., Vol.634, p.105; Northern Rhodesia-Southern Rhodesia: Agreement relating to the Central African Power Corporation, in Northern Rhodesia Government Notice, No.2333, of 1963.



scarce. However, the forms of African States bilateral economic agreements are essentially the same as those they conclude with non-African countries. But as illustrations below in this sub-section show, some of the economic or commercial agreements entered into between African States, contain certain specific economic legal provisions which seem to stress the kind of special relationships between the parties. This position is observed in the most-favoured-nation clause of the Egyptian-Zambian trade agreement.<sup>2</sup> In my opinion, such legal provisions reflect the desire by the parties, to promote their economic self-determination through economic co-operation.

In 1969, an economic treaty was concluded between Morocco and Algeria. It is entitled the Treaty of Brotherhood, Good-neighbourly Relations and Co-operation.<sup>3</sup> This is a general agreement of co-operation containing provisions relating to economic matters. The main objective of the treaty is to provide for mutual economic co-operation that forms the basis for peaceful and friendly relations leading to the advancement of the economies of

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2. See Egypt-Zambia: Trade Agreement, loc.cit., n.1; C.N. Papas, "Clause of the most-favoured nation: with reference to Egypt", in Review Droit Internationale Vol.14, (1961), p.226; R. Clute and R. Wilson, "The Commonwealth and favoured nation usage", in A.J.I.L., Vol.52, (1958), p.455-468; R.C. Snyder, The Most-Favoured Nation Clause: An analysis with particular reference to recent Treaty-practice and Tarriffs, (N.Y.1948), p.264.
  3. See Morocco-Algeria: Treaty of Brotherhood, Good-neighbourly Relations and Co-operation, signed at Ifrane on 15 January, 1969, in U.N.T.S., Vol.703 1969, Treaty No. 10095

both countries. It also provides that the Contracting Parties shall put a considerable degree of effort into the expansion of co-operation in all fields, for the benefit of the two countries.

It states in Article 2, that Morocco and Algeria aim to strengthen their common bonds in all fields, and especially in the economic and cultural fields, as this contributes towards expanding the areas of mutual understanding between the Contracting Parties. Procedures deemed appropriate for the attainment of their common wishes to overcome all obstacles and to make swift progress towards establishing the co-operation which the parties desire, are also employed.

According to Article 8, the treaty remains in force for twenty years from the date of its entry into force, and may automatically be renewed for another twenty years unless one of the parties informs the other in writing, one year before the expiry of the treaty, of its desire to terminate it. This long duration is a measure to provide more time for the establishment of firm economic co-operation between the two countries. Such regimes provide the African States with a long term legal basis for establishing economic projects that have a long term interest to both parties. This in itself brings about the development of close and progressive mutually beneficial economic co-operation. Thus we see the promotion of African States economic independence through long term economic agreements.



Another form of economic co-operation between African States which is relevant to this study is in the field of trade co-operation between States. Treaties concerning trade relations between African States already exist. For example, on the 16 October, 1966 in Cairo, a trade agreement was signed between the Republic of Zambia and the United Arab Republic.<sup>4</sup> The agreement provides that the Governments of the two countries desire to promote and develop economic relations between the two States on the basis of equality and mutual benefit. And to that end, Article 1 provides:

Within the scope of the laws and the regulations of the country, the Government of either country shall, in accordance with the spirit of the General Agreement on Tariffs and Trade accord to products of the other country as favourable a treatment as possible, in conformity with the principle of non-discrimination, with respect to custom duties, customs formalities and other matters affecting their importation and exportation.

This above citation can be interpreted as meaning that Contracting Parties will accord to the products of the other the same treatment as they accord to the products of any other G.A.T.T. member State. It also provides that the parties will apply the principle of non-discrimination in their dealing.

The most-favoured-nation (MFN) clause between the parties is somewhat restricted by the following

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4. See United Arab Republic and the Republic of Zambia: "Trade Agreement between the Government of the United Arab Republic and the Government of the Republic of Zambia", signed on the 16 October 1966, in U.N. Treaty Series, Vol. 670, 1969, p. 274.

points:

- (a) Advantages and facilities accorded or to be accorded by either of the two countries to contiguous countries.
- (b) Advantages and facilities accorded or to be accorded by the United Arab Republic to a member States of the Arab League.
- (c) Advantages and facilities resulting from a customs union and economic community agreement to which either of the two countries is or may become a party.

The most-favoured-nation treatment clause in the Egyptian-Zambian trade agreement complies with the requirement under Articles I and XXIV of the G.A.T.T. It is clear that under the Egyptian-Zambian agreement, Egypt may not accord to Zambia the same treatment as it gives to members of the Arab League. Reciprocally Zambia may not accord to Egypt the same treatment as it may give to members of sub-regional or regional economic organisations to which Zambia is a party. This provision, in my opinion, is included in the Agreement to avoid any misunderstandings or contentious interpretations of the most-favoured-nation clause by either party. It must be made clear that the inclusion of MFN clause in the Egyptian-Zambian Agreement is in conformity with the G.A.T.T. provisions, (Articles I & XXVIII)<sup>5</sup>

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5. See General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents, Vol.3, Text of the General Agreement 1958, (Sales No.GATT/1958-5/ (Geneve, 1958); Ibid., Vol.4, Text of the General Agreement 1958, including 1969 amendments, (Sales No. GATT/1969-1/(Geneve, 1969); Id., Programme for expansion of International Trade for Developing Countries, (Geneve 1962); J.H. Jackson, World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade, (Kansas City, N.Y. 1969), pp.802 and 850; G. Curzon, Multi-



The agreement also provides that, within the framework of the laws and regulations of the respective countries, both Governments agree to facilitate the widest possible exchange of products between the two countries, and for that purpose both countries shall endeavour to issue import licences as may be needed. Other commitments include the granting of necessary facilities for holding trade fairs and exhibitions for the products of each other; and conducting all trade in convertible currencies. Here arises the problem of changing national currencies since most, if not all African currencies, including the Zambian and Egyptian currencies, are not convertible.

Although the agreement is valid for one year only, it can be renewed. It can be terminated at three months' notice. Despite this provision that the Agreement may be terminated at the end of one year after its coming into force, it is presently valid, its validity may be an indication that the parties have a long term interest, desire and determination to promote their economic sovereignty through this trade co-operation between them.

The Treaty of Friendship and Solidarity between Morocco and Senegal signed in Rabat on the 15 September, 1966,<sup>6</sup> provides for co-operation including co-operation

5. Continued.....

lateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques, (London 1965); P.P. Kanthan, "Legal limitations of GATT and UNCTAD towards Mutual Co-operation", in Indian Journal of International Law, Vol.15, 1975, p.63.

6. See Morocco-Senegal: Treaty of Friendship and Solidarity, loc. cit., n.1.

on economic matters. Article 1 states that there shall be created a "Morocco-Senegalese Inter-State Ministerial Committee" with a view to strengthening and expanding co-operation between the two countries. The duties of this Inter-State Ministerial Committee are to consider measures designed to promote co-operation and solidarity, and to submit them for approval to the Heads of State who meet when they deem it necessary.

Article 6 mentions specifically, the need for economic co-operation.<sup>7</sup> It states: "The two governments will consult each other on problems of common interest .... and in the economic field, they will co-ordinate their development plans". The objective of the regime here is to provide for co-ordination of development plans of the two states, with the aim of eliminating unnecessary competition and duplication of industrial development projects. Of course, one should not forget that the main aim is to promote the economic sovereignty of the parties. However, the essence of economic planning development is to avoid spurious or ill-advised industrial development in the African continent.

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7. See Economic Bulletin for Africa, Vol.9, No.1, 1969, "Economic Co-operation in Africa", pp.7-13; Ibid., "African Trade: Trends and Problems", pp.13-31; U.N.E.C.A, Addis Ababa, 1971-72: "Survey of Economic Conditions in Africa", Part II, (U.N.NY, 1974); Ibid., Addis Ababa 1973: "Survey of Economic Conditions in Africa", Part I (U.N.NY. 1974); F. Borella, "The Results of Economic Co-operation", in Journal of African Law, Vol.16, 1972, p.344; M. Dobroczyński, "Africa's International Trade: A Forward Look", in Studies on the Developing Countries, No.6, (Warsaw, 1974), pp.85-105.



Senegal also signed a bilateral economic co-operation agreement with the Gambia in Bathurst on 19 April, 1967.<sup>8</sup> In this Treaty of Association, the two countries register their determination to further fruitful co-operation within the scope of a policy of very close association. It is stated in Article 1 that "the purpose of the Treaty is to promote and expand the co-ordination and co-operation in all areas" between the two countries. There is a provision for a meeting of the Heads of State of the two countries for the purpose of a broad examination of the different aspects of co-operation. The Bathurst Agreement also provides for the creation of an Inter-State Committee to study all measures tending to strengthen co-operation and solidarity and to submit its findings to the two Governments for approval.

A Protocol to the above treaty was signed at Dakar on 10th June, 1967.<sup>9</sup> It provides for the setting up of the Executive Secretariat of the Senegal-Gambian Inter-State Ministerial Committee. This Executive Secretariat, which is a permanent organisation, has the duty to investigate, co-ordinate, and pass information to the Senegal-Gambian Ministerial Inter-State Committee and it also implements the decisions of the said Ministerial

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8. See Senegal-Gambia: Treaty of Association, loc. cit., n.1.

9. See The Gambia-Senegal: Protocol to the Gambia-Senegal Treaty of Association, concerning the setting up of the Executive Secretariat of the Gambian-Senegal Inter-State Ministerial Committee, in U.N.T.S., Vol.640, 1968, p.106.

Committee. With the preliminary agreement of the two Governments, the Secretariat can initiate any action. Though the Protocol does not mention the criterion by which a person may qualify for nomination as the Executive Secretary, its Article 4 states that the Executive Secretary who is nominated by the joint decision of the two Governments, "shall be of Senegalese nationality". Either Government has the power to recommend termination of the term of office of the Executive Secretary.

In the light of Article 6 of the Protocol, the Executive Secretariat is responsible for drawing up its annual budget which is subject to approval by the Ministerial Committee. The budget is made up of a proportional contribution by the two Governments, which is agreed upon by the Ministerial Committee. Where bilateral economic agreements are not yet concluded and signed the parties initiating economic co-operation can find themselves entering into what may be termed quasi-economic agreements.<sup>10</sup> These are provisional agreements or agreements in the process of being made. Before a formal agreement is reached, or while negotiations are still being conducted, the parties may enter into an informal arrangement providing a basis for economic co-operation. But the ultimate aim of the parties under such an arrangement would be to conclude

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10. See Tanzania-Mozambique quasi-economic arrangement discussed below.



an economic agreement.

A decision was taken by Tanzania and Mozambique to encourage economic links between the two countries. According to the April 1977 issue of New African Development "A decision in principle has already been made for the establishment of a joint Mozambique-Tanzania airline, and details are expected to be released following the conclusion of current discussions between officials of the two countries".<sup>11</sup> This new joint venture between the two States is considered by Tanzania as initiating co-operation making "economic sense", following the crumbling of the institutions of the East African Economic Community.

Senegal and Libya signed an agreement of co-operation in the "economic, technical and scientific spheres ...."<sup>12</sup> Under this agreement, the two countries undertook to exchange experts, specialists and advisors in the technical and scientific fields.

It may be concluded that the significance of bilateral economic agreements between African States is

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11. See Tanzania-Mozambique, "Now links grow stronger between Tanzania-Mozambique", in New African Development, April, 1977, (London, 1977), p.290; L.B. Sohn, "The Organs of Economic Co-operation in Africa", in Journal of African Law, Vol.16, p.212; Lesotho-South Africa: Agreement on Air Services, 27/28 September, 1967, in U.N.T.S., Vol.208, p.4; African Wood Production and Exporting Countries: Agreement establishing the Organisation of Wood Production and Exporting Countries, 27 May, 1975, in I.L.M., Vol. 14, No.1, 1975, p.1105.
  12. See Africa Research Bulletin, of November 1976, Vol.13 No.11, p.4090; U.N.E.C.A. Document: E/CN.14/WP.1/100, "Major trends and developments in Africa's Trade since UNCTAD III, 1975"; Id., Document: E/CN.14/659(E/CN.14/ECO/112), "A report on economic co-operation in Africa", 1977; UN.Dep.of Economic and Social Affairs, "World Economic Survey 1963 - Trade and Development: Trends, needs and policies", (U.N.N.Y.1969).

that they provide for co-operation in specified areas of the economic activities of each party. Although it has been found that the African States do not emphasise the concluding of bilateral economic agreements to regulate economic relations between themselves, these agreements play a very important role by binding the parties to promote economic co-operation within the norms of international economic law.

## 2. Agreements between African and Non-African States

Bilateral agreements in the area of economic co-operation have been concluded between African States and those of other continents. Due to the fact that there are numerous bilateral economic agreements concluded between African States and those of other regions, it is not possible in this sub-section to examine individually every existing agreement. Hence economic agreements discussed below constitute a basis for grasping the concepts involved in such agreements.

The agreements named below are examples of the different types of legal arrangements entered into between African and other states. These are agreements concerning: Economic co-operation in general; Technical co-operation; Trade; Promotion and protection of investments; Monetary co-operation; Air and Maritime transport co-operation; Avoidance of Double Taxation; and Agricultural



commodity sales agreements.<sup>13</sup> Because some of the above-mentioned agreements have been discussed elsewhere in this thesis, the choice of the treaties discussed below is based solely on treaties of an economic nature.

On 8th February, 1966, the United States of America and Togo signed a "Treaty of Amity and Economic Relations."<sup>14</sup> This treaty of general economic co-operation between the two parties, provides for a friendly treatment of the nationals of the other party,<sup>15</sup> when such nationals are in the territory of the other. But far more important for this work, the Treaty provides that each party accords, at all times, fair and equitable treatment to nationals and companies of the other Party, (Article IV). Under this Article the Parties are to refrain from applying unreasonable or discriminatory measures that would impair the legally acquired rights and interests of the nationals and

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13. See as an example the following agreements: Cameroon-France: Agreement on Co-operation in Economic, Monetary and Financial Matters, 13 Nov.1960, in U.N.T.S., Vol.741 p.159; Ethiopia-Finland: Agreement on Technical Co-operation, 25 Nov.1968, in U.N.T.S., Vol.680, p.117; Guinea-Bissau-U.S.S.R.: Agreement on Trade, 21 Feb.1975, in I.L.M., Vol.14, p.943; Egypt-U.K.: Agreement concerning the Promotion and Protection of Investments, 11 June 1975, in U.N.T.S., Vol.842, p.153; Lesotho- U.K.: Exchange of Note: Guarantee by U.K. and maintenance of reserve in sterling by Lesotho, 6 Jan.1970, in U.N.T.S. Vol.745, p.258; Egypt-Japan: Convention: Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income, 28 July, 1966, in U.N.T.S., Vol.736, p.373.

14. See Togo-U.S.: Treaty of Amity and Economic Relations, signed at Lomé, 28 Feb.1966, in U.N.T.S., Vol.680, pp. 159-183. The Treaty came into force on 5 Feb.1967, i.e. one month after the day of exchange of the instruments of ratification, which took place at Washington on 5 January, 1967, in accordance with Article XV (2).

15. See Egypt-France: Convention on Settlement of Problems relating to the Assets of French Nationals in the ...../

companies of each other. Each Party is required to ensure protection of lawful contractual rights and to provide effective means of enforcement, in conformity with its relevant laws. But a point that may be raised is whether Togo, whose nationals do not even have the capacity to effectively invest in their own country, will be able to establish any companies or operate investment projects in the U.S.A. Under the Agreement however, the nationals of Togo are accorded the same investment rights as those provided for the U.S.A. nationals investing in Togo. This means that the nationals of the two countries are treated reciprocally under the Agreement in theory if not in any useful sense in practice.

Under Article V of the Treaty, nationals and companies of either Party are accorded equitable treatment with respect to establishing, as well as acquiring interests in, enterprises of all types for engaging in commercial, industrial, financial and other business

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15. Continued.....

Territory of Egypt, 28 July, 1966, in U.N.T.S., Vol. 732, p.141; Donovan, "Nigeria after Indigenisation: Is there any room for the American Businessman? op. cit., above; Senegal-Federal Republic of Germany: Air Transport Agreement, 29 Oct. 1964, in U.N.T.S. Vol.728, p.99; Uganda-Denmark: Agreement on Technical Co-operation, 3 July 1968, in U.N.T.S. Vol. 660, p.371; Uganda-U.K.: Exchange of Letters, Guarantee by the U.K. and maintenance of the Minimum Sterling Proportion by Uganda, 21 Sept. 1968, in U.N.T.S., Vol.687, p.73; Zaire-U.K.: Exchange of Notes concerning a grant by the U.K. to the Republic of Zaire, 1976, (Cmnd.6709), in U.K. Treaty Series, Vol.12, 1977; Mozambique- U.K.: Exchange of Notes concerning an interest-free loan by the U.K. to the Peoples' Republic of Mozambique, (Cmnd.6824), in U.K. Treaty Series, Vol.47, 1977; Lesotho-U.K.: Exchange of Notes concerning Guarantee by U.K. and maintenance of reserves in Sterling by Lesotho, in U.N.T.S., Vol.745, p.258.



activities within the territory of the other Party. But each reserves the right to limit the extent to which aliens may establish or acquire interests in enterprises engaged within its territory in communications, air or water transport, trust functions, banking involving depository functions, or the exploitation of land and other natural resources. The Parties further agree that those limitations which may be imposed on aliens, may only be so imposed provided that each accords to the nationals and companies of the other Party, treatment no less favourable than that accorded to nationals and companies of any third country.

The U.S.A. Togo Treaty is quite a comprehensive legal instrument because it provides for economic co-operation, inter alia, in areas such as trade, promotion and protection of investments, air and sea transport and monetary matters. This Treaty is comprehensive because unlike other agreements examined in this sub-section, it regulates a wide variety of economic co-operation relations between the parties.

An agreement of technical co-operation was signed at Addis Ababa on 25 November, 1968, between Finland and Ethiopia.<sup>16</sup> As stated in its Article 1 (1), the purpose of the agreement is to set forth terms and

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16. See Ethiopia-Finland: Agreement on Technical Co-operation, loc.cit. n.13, p.117; Ethiopia-Italy: Treaty of Commerce, signed at Addis Ababa, 24 June, 1897, in Clive Parry, The Consolidated Treaty Series, Vol.185, 1897, (Oceana Publication, N.Y., London, 1979), pp.294-298; UNTDB, Proposals before the Committee on Transfer of Technology: Draft outline of International Code of Conduct from Developing Countries, (UN. N.Y. 1976); L.H.Worrzel, "Technology Transfer on Pharmaceutical Industry", in UNITAR Research Report, No.14, (UN. N.Y.1971); R.B.Stobaugh, "The International Transfer of Technology in the Establishment of the Petrochemical Industry in Developing Countries", in UNITAR Research Report No. 12, (UN. N.Y.1971).

conditions that would generally govern the technical co-operation between the two Parties. Article 1 (2) provides that co-operation activities may be in the following forms:

- (a) Provision of advisory and operational experts and volunteers. The details concerning activities of volunteers shall be subject to a separate agreement or arrangements;
- (b) Provision of such equipment and supplies as may not be available in Ethiopia and as may be required for the useful occupation of operational and advisory experts and other equipment that may be required to further the Co-operation Activities;
- (c) granting of scholarships for postgraduate studies or vocational training and the arrangement of training courses;
- (d) undertaking any kind of joint technical co-operation projects.

The agreement also describes the status of Finnish personnel who are divided into two categories: operational personnel and advisory personnel, (Article 2). This means that the Government of Finland, under the agreement, has freely accepted the undertaking to provide necessary personnel to enable the carrying-out of any agreed technical co-operation projects. The agreement provides for cost distribution, Article 4. The costs of the co-operation activities are covered by the two parties. This means that in those areas where a government co-operates by either providing personnel or materials for the projects, that government bears the cost involved: these costs are not the responsibility of the other party. Trade agreements have been entered into between



the Soviet Union and a number of African States. The Soviet Union normally concludes long-term trade agreements (see below).

In 1961, a number of trade agreements were concluded between the Soviet Union and African Countries. These include Trade Agreements between the U.S.S.R.- Mali (March, 1961);<sup>17</sup> U.S.S.R.- Sudan (November, 1961);<sup>18</sup> U.S.S.R.- Ghana (November, 1961)<sup>19</sup> and U.S.S.R.- Togo (June, 1961).<sup>20</sup> Agreements between the Soviet Union and African countries have one common characteristic: that is, they contain the most-favoured-nation clause. This international economic legal device is used as a yardstick to indicate that trade relations between the parties are and must be conducted on an equal footing, which is not inferior to the treatment accorded to the most-favoured-third<sup>21</sup> party States.

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17. See Mali-U.S.S.R.: Trade Agreement (with annex) signed at Moscow on 18 March, 1961, in U.N.T.S., Vol.687, (1969), p.263.
  18. See I., Sudan-U.S.S.R.: Long-Term Trade Agreement (with annex) signed at Khartoum on 1 November 1961, p.281.
  19. See Ghana-U.S.S.R.: Long-Term payments agreement, signed at Moscow on 4 November, 1961, in U.N.T.S., Vol.655, (1969), p.181; Upper-Volta-U.S.S.R.: Trade Agreement, 8 March, 1968, in U.N.T.S. Vol.715, p.143; African Development, Special Supplement, September 1970, "Yugoslavia trade with twenty African States".
  20. See Togo-U.S.S.R.: Trade Agreement, signed at Lome on 12 June, 1961, in U.N.T.S., Vol.730, p.173; W.G.Friedman, The Planned State and the Rule of Law, (Victoria, 1964); UNCTAD, TD/B/238/Rev.1, Innovations in the practice of trade and economic co-operation between the Socialist Countries of Eastern Europe and developing countries: A study presented by the Institute of Economics of the World Socialist System, (Moscow, N.Y., Geneva, 1970); G. Rubinstein, "Aspects of Soviet-African Economic Relations," in Journal of Modern African Studies, Vol.8, 1970, p.389; C. Stevens, "Africa and the Soviet Union", in International Relations, Vol.111, No.12, 1971, p.1014; Id., "In search of the Economic Kingdom: The Development of Economic Relations between Ghana and the USSR" in Journal of Development Areas, Vol.9, No.1, 1975, p.3
  21. See M. Domke, & J.N. Hazard, "State trading and most-favoured-nation clause", in A.J.I.L., Vol.52 (1958), ....

For instance, Article 2 in the U.S.S.R.-Sudan Long-Term Trade Agreement stipulates that:

In order to promote and facilitate trade between the Union of Soviet Socialist Republics and the Republic of the Sudan, both Governments shall apply the most-favoured-nation treatment in all matters relating to trade between the two countries.

However the same Article further provides for specific exceptional cases to which the most-favoured-nation clause may not be applied. It stipulates that the principle may not be applied to:

- (a) Advantages which are or may hereafter be accorded by either of the Governments for the purpose of facilitating frontier traffic;
- (b) Special privileges or exemptions which are or may hereafter be granted by the Republic of the Sudan to Arab countries;
- (c) Special privileges or exemptions which are or may hereafter be accorded by the U.S.S.R. or the Sudan to contiguous countries;
- (d) Exemptions resulting from a customs union.

Numerous agreements relating to investment guarantees have been concluded between the United States of America and many African States. These agreements serve as legal protection of the economic interests of both parties. For instance in an "Exchange of Notes constituting an Agreement between the United States of America and Malawi relating to Investment Guarantees",<sup>22</sup> Article 1 stipulates

21. Continued.....

p.55; L.G. Jahnke, "The European Economic Community and the Most-favoured-nation clause", in Canadian Yearbook of International Law, Vol.1, (1963), p.252.

22. See Malawi-U.S.: Exchange of Notes Constituting an Agreement between the United States of America and Malawi relating to Investment Guarantees", in U.N.T.S., Vol.693, (1969), p.3. The Gambia and U.S. concluded a similar agreement which is contained in U.N.T.S., Vol.701, (1969), p.139. For numerous similar agreements, consult other volumes of the U.N. Treaty Series. See also G.P. Verbit, Trade Agreements for Developing Countries, (N.Y. 1969); B.Cosovix,...



that:

When nationals of the Government of the United States of America (the Guaranteeing Government) propose to invest with the assistance of guarantees issued pursuant to this Agreement in a project or activities within the territorial jurisdiction of the Government of Malawi (the Host Government), the two Governments shall, upon the request of either, consult respecting the nature of the project or activity and its contribution to economic and social development in Malawi.

Apart from the consultation and agreement on projects to be established, the two Parties agree in Article 2 that the procedure set forth in the Agreement is to apply only with respect to guaranteed investments in projects or activities approved by the Host Government. This means that if any project or activity is not approved by Malawi, the nationals of the United States of America may not conduct those particular investment activities in that African State. The Agreement provides a legal regime under which the Guaranteeing Government may make payment to any investor under a guarantee, and the Host Government has an obligation to recognise any transfer to the Guaranteeing Government of any currency, credits, assets, or investment on account of which payment under such guarantee is made. Recognition is also accorded to succession rights of the Guaranteeing Government to any right, title, claim, privilege or cause of action existing, or which may arise, in connection with

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22. Continued.....

UNCTAD: Conflict and Compromise; the Third World's Quest for an Equitable World Economic Order Throughout the United Nations, (London, 1972).

the investments or economic activities compatible with laws of the Host Government.<sup>23</sup>

The conclusion which may be reached is that bilateral economic agreements between African and other States provide for the transfer of technology and capital to the African countries. These agreements also provide for the transfer of investment profits from African countries to the investing countries. One other important characteristic of those economic agreements is that their provisions contain certain fundamental principles of international economic law, e.g. the principles of mutual and equitable benefit; and international co-operation for development.

## Section B. Sub-regional economic co-operation

### 1. East African Economic Co-operation: Treaty for East African Economic Co-operation (EAC).

Before analysing the Treaty of East African Economic Co-operation<sup>24</sup> it is essential to state a few facts concerning the situation obtaining in the sub-regional

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23. See B. Dinwiddy, Promoting African Enterprise, (London, 1974); A. Harrison, The Framework of Economic Activity: The International Economy and the Rise of the State in the 20th Century, (N.Y.1968); R.C. Hauntry, Economic Aspects of Sovereignty, (N.Y.1930); V. Held, Public Interest and Individual Interests, (N.Y.1970); P.H. Koojmans, The Doctrine of Legal Equality of States: An Inquiry into the Foundations of International Law, (Leyden, 1964); Z.A. Kronfol, Protection of Foreign Investment: A Study in International Law, (London, 1972); S.K. Dale-Bah, "The legal regime of transitional investment agreements that is most compatible with both the encouragement of foreign investments and the achievement of the legitimate national goals of the host states", in Journal of African Law, Vol.18, 1971, p.241

24. See L.S. Wionczek, Economic Co-operation in Latin America, Africa and Asia: A handbook of documents, (Massachusetts, 1969); A.D. Hazelwood, Economic Integration: The East African Experience, (London, 1975); Kenya-Tanzania-Uganda: Treaty for East African Co-operation, 6 June, 1967, in I.L.M. Vol.6, 1967, p.932



organisation at the time of writing. A few historical facts are also very relevant to the matter in hand.

East Africa came together in a customs union which became the East African High Commission in 1948 and the East African Common Services in 1961. Up to the time when the three member countries (Uganda, Tanzania and Kenya), attained political independence, they were bound into an economic liaison created by the British Governments during British rule. British economic interests and influence remained prominent even after the three territories had achieved their political self-determination. This is shown by the discontent revealed by some of the member countries of the sub-region regarding the inherited economic institutions and legal arrangements. Due to the dissatisfaction indicated by Uganda and Tanzania in connection with what they saw as the unbalanced economic development in the union, which in their view favoured the development of one partner State - Kenya - a Commission of enquiry was sought. Its main task was to investigate the complaints and make recommendations regarding the steps to be taken by the union members. The Philip Commission drafted the Treaty for East African Economic Co-operation, which was effected by the Community member States on 1 December, 1967.

In the light of this treaty, it was hoped that new industries would be created in the sub-region as a whole. It was also anticipated that much emphasis would be put on creating in particular new industries in and promoting

the economic advancement of Uganda and Tanzania. This was necessary in order to off-set the imbalance in industrial development and to enable these two countries to catch up with the economic development of their major partner - Kenya.

As history has shown, the discontent of Uganda and Tanzania regarding the privileged position of Kenya both in the East African Union and East African Community has persisted throughout the lifetime of the East African Economic Community. The East African Economic Community started to disintegrate a couple of years before reaching its tenth anniversary. Around 1976, the parties started to pull out assets from some of the Community's institutions unilaterally. For example Kenya argued that:

by dissolving the East African Air-Ways and taking over its assets, including aircraft, premises, and workshops and converting them into assets of the Kenya Air Ways, Kenya has accepted obligations which could ordinarily be shouldered together,<sup>25</sup>

According to Tanzania's Premier Edward Sokoine:

the Community, as we have known it with such major common services as Civil Aviation, Harbour, Railways and so on, as well as the laissez-faire Common Market is now awaiting legal dissolution... In this situation it is impossible to put the clock back.<sup>26</sup>

President Amin of Uganda complained that Kenya and Tanzania had "grabbed" the assets of the Community, when he announced in a message marking the fifteenth anniversary of Uganda's

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25. See New African Development: May 1977, p.386; A. Hazelwood, African Integration and Disintegration: Case Studies in Economic and Political Union, (London, 1967).

26. See New African Development: August 1977, p.823; I.B. Kravis, Domestic Interest and International Obligations: Safeguards in International Trade Organisations, (Philadelphia, 1963).



independence, on 9 October, 1977 that his "country would accept no liability for the East African Community."<sup>27</sup> With the East African Community in a moribund state, the member States have proceeded to take jointly agreed action which would bring the legal dissolution of the Community.

The Governments of Kenya, Uganda and Tanzania have selected Mr. Victor Umbricht, a Swiss diplomat to act as mediator in order to help the three countries reach an agreement on division of the assets and liabilities of the corporations and institutions previously operated by the East African Community. Except the East African Development Bank (EADB), all other institutions will legally cease to function upon reaching agreement. One of Mr. Umbricht's tasks is to make recommendations concerning the future of the Bank. But the main task before Mr. Umbricht is "to recommend to the partner-States proposals for the permanent and equitable division of the assets and liabilities of the EAC Corporations and the General Fund Services."<sup>28</sup>

However, whatever reasons may have brought about the demise of the East African Community, one of the major and fundamental problems was the colonial legal basis upon which the Community was formed.<sup>29</sup> Under the

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27. See The Times, Monday October 10, 1977, p.6; African Development May, 1977, "East African Community Crumbles", p.470.

28. See United Nations Monthly Chronicle, Vol.XV, No.2, February, 1978.

29. See Hailey (Lord), African Survey Revived 1956: A Study of Problems Arising in Africa South of the Sahara, (London, 1967); G. Myrdal, An International Economy: Problems and Prospects, (London, 1962); U.N. Conference on Trade and Development, Current Problems of economic integration: The problems of Distribution of benefits and costs and selected corrective measures, (UN. N.Y. 1975).

1967 Treaty old colonial institutions had continued to exist, though then under the control and administration of the three newly independent States. Because of this protracted functioning of such institutions and the lack of new ones which would promote economic independence of the partner-States, collapse of the East African Community was inevitable.<sup>30</sup>

The Treaty for East African Economic Community, together with the Community's institutional infrastructure, provide a legal and institutional basis for an empirical study and analysis of African institutional and legal regulation of international economic co-operation between States of a given African sub-region. For that reason it is essential to discuss the Treaty.

The Treaty for East African Co-operation consists of ninety-eight (98) Articles defining various aspects of economic co-operation between the member States. It is stated in the preamble that three Sovereign States of Uganda, Tanzania and Kenya, having enjoyed close relations for many years are determined through their governments to strengthen their industrial, commercial and other ties including common services by establishing an East African Community and a Common Market. Under the Treaty, the Common Market is established as an integral part of the Community.

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30. See U.N.E.C.A., Survey of Africa, Vol.III, "East African Sub-region", Document No.E/CN/14/482, Sales No.E.69,II.K1, (UN. N.Y. 1971); Irving Leonard Markovitz, "Bureaucratic Development and Economic Growth", in The Journal of Modern African Studies, Vol.14, No.2, (London, 1976), pp.186-200.



Article 2 which describes the aims and objectives of the Community stipulates in part (1) that "it shall be the aim of the Community to strengthen and regulate the industrial, commercial and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefits whereof shall be equitably shared."<sup>31</sup> The Article also mentions inter alia the need for establishment and maintenance of a common customs tariffs and a common excise tariff; co-ordination of economic planning; co-ordination of transport policy; and harmonisation of the monetary policies.

The Treaty also establishes the institutional framework for economic co-operation of the sub-region.<sup>32</sup> The institutions of the Community are: the East African Authority; East African Legislative Assembly; East African Ministers; Common Market Council; Common Market Tribunal; Communication Council; Financial Council; Economic Consultative and Planning Council; and the Research and Social Council and such corporations as those relating to the East African Air Ways; Railways; Harbours; and Post and Tele-communications. The Parties may under provisions of the Treaty constitute any other bodies,

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31. See Wionczek, Economic Co-operation in Latin America, Africa and Asia, "Document 8, Treaty for East African Co-operation" pp.168-233, loc.cit. n.24.

32. See Paulo Sebalu, "The East African Community", in Journal of African Law, Vol.16, 1972; M.A. Ajomo, "Economic Organisations: The African Experience", in International and Comparative Law Quarterly, Vol.25, 1976; U.N.E.C.A., Economic Co-operation and Integration in Africa: Three Case Studies, Doc. ST/ECA/109, (UN. N.Y.1969); U.N.E.C.A., Co-operation for economic development of Eastern Africa: Report of the East African Team, (UN. N.Y.1971).

departments or services as they find necessary. Institutional machinery set up by sovereign States to promote their economic self-determination could either be supra-national or "confederal". The sovereign States would in advance bind themselves to abide by the decisions made by the supra-national organs. For instance, the East African Authority which consists of the Presidents of the Partner States, since it takes its decisions by a unanimous vote, and by virtue of its composition (because of the position of authority occupied by the Heads of State by virtue of them being sovereign representatives of the three States) when it entered into the conclusion of the Treaty, exercised State sovereignty, and thereby committed the three countries to abide by the provision of the treaty; and thus by its own decision as an organ.

Confederal organs would make recommendations which individual Governments are free to accept or reject. The legal instrument (Treaty) establishing and incorporating provisions concerning the competence of confederal organs will commit the member States to enter into joint consultations and negotiations with a view to integrated sub-regional development. In fact, the two mechanisms are often combined, with organs of co-operation being given supra-national powers in certain limited areas, while Governments retain their freedom to accept or reject the recommendations of the organs relating to



major policy issues.<sup>33</sup>

It is deemed that the supra-national mechanism has certain advantages: the organ of co-operation is able to make decisions on the issues within its competence in the interest of the integrated group as a whole and can give directives to national organs acting as its executing agents. The confederation mechanism allows for recommendations of the organ of co-operation which have no binding force and ultimately leaves responsibility for their implementation to the member Governments. Article 43 of the Treaty talks about the functions of the Community. It stipulates that:

1. The Community shall, on behalf of the Partner States, through its appropriate institutions, perform the functions given to it, and discharge the responsibilities imposed upon it, by this Treaty in relation to the establishment, functioning and development of the Common Market.
3. The Corporation shall, on behalf of the Partner States and in accordance with this Treaty and the laws of the Community, administer the services specified .....
4. The Community shall provide the machinery to facilitate the co-ordination of the activities of the Partner States on any matter of common interest.
5. Subject to this Treaty, the Community shall so regulate the distribution of its non-physical investments as to ensure an equitable contribution to the

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33. See L.B. Sohn, The Organs of Economic Co-operation in Africa, loc.cit. above; T.Y. Shen, "Sectorial development and planning in Tropical Africa", in East Africa Economic Review, Vol.7, 1975, pp.25-48; W. Simon, "International Economic Co-operation as the States see it", in The Banker, Vol.125, 1975, pp.1463-1467; G.O.Z. Sundstrom, "The legal procedures and techniques of economic co-operation", in Journal of African Law, Vol.16, 1972, p.229

foreign exchange resources of each of the Partner States.

6. The Community shall so arrange its purchases within the Partner States as to ensure the distribution of the benefits thereof to each of the Partner States.

According to my analysis of the functions of the East African Community and its Institutions, apart from the problem of its colonial origin, the failure of the Community also lies with the member States which could not fulfil their obligation under the Treaty. If one was to study the reasons why the Community has crumbled away, one would find that the major problems evolve around the five points listed above from Article 43. It has been observed that Kenya has complained about Tanzania and Uganda purchasing goods from outside the Community which they would normally purchase from Kenya.<sup>34</sup> On their part, Tanzania and Uganda are not satisfied because most of the benefits are presently distributed in favour of Kenya by virtue of her being the most industrial partner. This, they say is due to former colonial arrangements to industrialise Kenya in the sub-region.

One of the contributing factors to the disintegration

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34. See S. Jack, "Regional development in the context of overall national development and planning", in Economic Bulletin for Africa, Vol.10, No.2, 1974, pp. 25-40; J. Gold, "Development in the law and institutions of international economic relations: Weighted voting powers, some limits and some problems", in A.J.I.L., Vol.68, 1974, p.475; R.H. Graveson, Uniform laws on International Sales Act, 1967, A Commentary, (London, 1967).



of the East African Community is a loophole allowed under Article 48 of the Treaty.<sup>35</sup> This Article gives power to the Authority to exercise their functions through the East African Ministers and Councils. Part 2 of the Article provides: "The Authority may give directions to the Councils and to the East African Ministers as to performance of any functions conferred upon them, and such directions shall be complied with." It is by using this provision that the East African Authority has avoided meetings since the Ugandan coup d'etat in January, 1971. That provision is indeed a handicap in itself to the proper functioning of the Authority.

As indicated above, the Treaty provides that the East African Common Market is an integral part of the Community. Below I consider the basic requirements for a successful common market, namely: common external customs tariff, common excise tariff, and free movement of goods, capital and labour. Since the objectives of customs unions are to agree on a common tariff nomenclature and to effect the elimination of trade barriers between partner States while maintaining them against the rest of the world, the Treaty stipulates in Article 5 that: "the Partner States recognising that a common external customs tariff is a basic requirement of the Common Market, agree to establish and maintain a common customs tariff

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35. See I.L. Markovitz, "Bureaucratic Development and Economic Growth", loc.cit.above; P.J. McGowan, "Economic Development Performance in Black Africa", in The Journal of Modern African Studies, Vol.14, 1976, pp.25-40

in respect of all goods imported into Partner States from foreign countries." But Part 2 of the same Article provides for any Partner State with the agreement of the Ministers of the other Partner States responsible for public finance, to depart from the common external customs tariff in respect of the importation of a particular item into the State. Thus we see that the law provides a loophole which a Partner State can justifiably use to avoid importation of certain items of its choice from other Partner States.

Article 6 is a safeguard against the practice of resale of goods imported by any Partner State from outside the Common Market, to the other Partner States:

The Partner States agree not to exempt, remit or otherwise relieve from payment of customs duty any goods originating in a foreign country and imported by the Government of a Partner State if:

- (a) such goods are imported for the purpose of resale or for any purpose other than consumption or use by that Government; and
- (b) in the case of goods provided by way of aid, by any Government or organisation, either gratis or on terms less stringent than those appropriate to ordinary commercial transactions, such goods are intended for the purpose of resale or consumption in, or are transferred to, any country other than the Partner State which is the recipient of such goods.

This means that if goods are imported by a Partner State but are subsequently re-exported to another Partner State the duty must be paid over by the re-exporting state to the consuming state. Duty must also be paid on any imported materials which may be re-exported for use in



the manufacture of local products. Should any product be exported, the duty paid on the materials is transferred to the consuming state, Paragraph 2, of Article 6 requires that imports by the Government of a Partner State, the Community and the Corporations for their own use be exempted from customs duty. Thus it states that: "The Partner States agree that the Community and the Corporations shall be enabled to import free of customs duty any goods required for the purpose of their operations except such goods as are intended for sale, or are sold, to the public".

It may be mentioned here that Articles 5, 6, 7 and 8 deal with external trade, when one of the Partner States imports goods from any third country. Articles 9 to 16 are devoted to the intra-East African Trade. Article 17 and 18 are concerned with excisable goods. Under Article 17, the "Partner States agree to establish and maintain a common excise tariff in respect of excisable goods manufactured, processed or produced in the Partner States". Paragraph 2, of the same Article allows that a Partner State may depart from common tariff for revenue purposes, provided the Ministers of the other Partner States responsible for public finance are consulted on the issue.<sup>36</sup> The other condition on which a Partner State can depart from the common excise tariff in respect of the manufacture, processing or production of particular goods is that the other Partner

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36. See D. Steele, "The Theory of Dual Economy and African Entrepreneurship in Kenya", in Journal of Development Studies, Vol.12,1975-6; J. Vanderlinden, "Objectives, objects and levels of economic co-operation", in Journal of African Law, Vol.16,1972, p.220.

States shall have due regard to the administrative practicability of enforcing the departure, so that it does not become detrimental to the proper functioning of the Common Market.<sup>37</sup>

The Common Market Council was given responsibility to determine and remove the then existing differences in the excise tariff which would hamper the progress and proper functioning of the Market.

On the question of free movement of goods, capital and labour, the Treaty provides for measures to promote balanced industrial development in the Partner States. A Partner State can not impose customs or import duty in respect of goods transferred to that State from another Partner State and which originated from that other Partner State. But under Article 20 conditions are set under which any Partner State can impose a tax known as "Transfer Tax" on manufactured goods from the other Partner States. For example one of the conditions set is that a Partner State which is in default in its total trade in manufactured goods with the other two Partner States may impose transfer taxes upon manufactured goods which are transferred to that State and originate from either of the other Partner States.

Article 21 provides for the establishment of the East African Development Bank whose objectives and functions are set out in the Charter of the Bank. It is one of the

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37. See J.N. Hazard, "Commercial discrimination and international law", in A.J.I.L., Vol.52, (1958); G. Curzon, Multinational Commercial Diplomacy: The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques, loc.cit., n.5; I.B. Kravis, Domestic Interest and International Obligations, loc.cit. n.26.



objectives of the Bank to "provide financial and technical assistance to promote the industrial development of the Partner States .... by means of supplementing the activities of the national development agencies of the Partner States by joint financing operations and by use of such agencies as channels for financing specific projects."<sup>38</sup> The Treaty also provides for the convertibility of the Partner currencies at par and allows bona fide transfers on current accounts. Article 24 talks of No Exchange Commission charges during the transfer of currencies from one Partner State to the other.<sup>39</sup>

After examination of the provisions of the Treaty for East African Economic Co-operation, and having seen that the East African Community is now defunct, it is useful to show that a new economic organisation for the sub-region is emerging. The proposed new economic integration<sup>40</sup> is not restricted to the former member-States of the East African Community, but covers countries of Eastern and Southern Africa.

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38. See Wionczek, Economic Co-operation, Document 28, "The Charter of East African Development Bank", p.500, loc. cit.n.24; J.F.McDaniels, International Financing and Investment, (N.Y. 1964).

39. See Eugene Cotran, "The Unification of Laws in East Africa", in The Journal of Modern African Studies, Vol.1, No.2, (London, 1963), pp.209-20; Ibid., R.H. Green, "Multi-purpose Economic Institutions in Africa", in The Journal of Modern African Studies, Vol.1, No.2, 1963, pp.163-84; K.W. Ryan, International Trade Law, (Sydney, 1975).

40. See A.A.A. Menchaca, "Multinational Firms and Regional Process of Economic Integration", in Recueil Des Cours, 1976, Vol.150, (Leiden, 1977), pp.337-479; A.J. Peaslee, International Intergovernmental Organisations, Constitutional Documents: General and Regional, Political, Economic, Social, Legal, Defence, Revised 3rd. Ed. ....

Seventeen Eastern and Southern African States are taking measures to establish an economic zone as a means to promote their economic self-determination through integration. In March, 1978, a declaration of intent and commitment was signed in Lusaka, Zambia, by the responsible Ministers of the States concerned. The countries that participated at the Lusaka meeting were: Angola, Botswana, Ethiopia, Comoros, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, Somalia, Swaziland, Uganda, Tanzania and Zambia. Though Djibouti was not represented at the Lusaka meeting, it is expected to become part of the proposed economic organisation.<sup>41</sup>

Prima facie, the aim of the States involved in this whole venture, is to create a preferential trading zone and clearing and payments system for their countries. But there are also long-term projects. It is believed that should everything go as planned, within 10 years time, a new and viable Economic Community of Eastern

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40. Continued.....

2 Vols. (The Hague, 1974); A.N. Allott, "Towards the Unification of laws in Africa", in International and Comparative Law Quarterly, Vol.14, (1955), p.366.

41. See Alexander Kodatchenko, "New Trade Grouping Planned", in Development Forum, Vol.VI, No.3, (1978), pp.1-3; The Times, Friday March 28, 1980, p.8, Mr. Mugabe preparing for black summit in Lusaka", from Nicholas Ashford, Salisbury, March 27, 1980; The Daily Telegraph Saturday March 29, 1980, p.6, "TRANSPORT AGENCY, African States' plan"; S.A. Lawrence, International Transport: The Year Ahead, (London, 1972); C. Widstrand, African Institute of Economic development and planning: Multinational Firms in Africa, (Scandinavia, 1975); P. Robson, "Economic Integration in Southern Africa", in The Journal of Modern African Studies, Vol.5, No.4, 1967, pp.469-490.



and Southern African States and a monetary union in the area will evolve.

In 1978 Ministers of the seventeen States were thought to have set up an Inter-Governmental Negotiating Team, and approved terms of reference for the team and a time-table for its work. The team so set up is expected to draft the treaty establishing the preferential trade area and the clearing and payments system. In fact, these States wish to create clearing house and payment arrangements, which will enable them to create a unit of account. This measure, it is said, is a result of the experience of the now defunct East African Community which did not have such arrangements, and one of whose problems was the transfer of funds from one Partner State to another.

According to the U.N. Economic Commission for Africa (ECA) which is assisting those countries to set up the organisation, the constituent States have already given the green light for some institutions to be converted or set up to serve the sub-region. Such institutions would include: U.N. Development Programme (UNDP) - assisting East African Management Institute based in Arusha, Tanzania. This was formerly an East African Community Institution for Uganda, Kenya and Tanzania.<sup>42</sup> The Mineral Development

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42. See The Telegraph, Thursday, November 8, 1979, p.5 "Tanzania 'hovering on the brink of bankruptcy'"; The Guardian Friday, November 9, 1979, p.11 "Socialist Tanzania rounds on IMF"; The Guardian, Tuesday March 18, 1980, p.5, "Nyerere makes emergency aid appeal to the West: Tanzania faces food shortage", from Martin Honey in Dar-es-Salaam; The Guardian Third World Review: Monday March 17, 1980, p.10, "GUEST COLUMN: Julius Nyerere". Here Hyerere talks about "The Major economic problems" ... facing Tanzania; C.H. Alexandrowicz, World Economic Agencies: Law and Practice, (London, 1962).

Centre which is now being set up at the new Tanzanian capital, Dodoma; The Statistical Institute to be based at the University of Makerere, in Uganda; A Sugar Technology Institute which will have its headquarters in Mauritius; A Shipping and Marine Training Centre tentatively agreed to be sited in Mozambique; Veterinary and Agricultural research centres which would be based in Kenya; and a proposed East African coastal shipping line would also be one of the institutions to serve the sub-region. The existing Eastern African Shipping line which is owned by Kenya, Tanzania, Uganda and Zambia, may become a subsidiary of the one being proposed.

It has been shown that the Treaty for East African Economic Co-operation is in the process of being replaced by a new broadly based treaty which like its predecessor would operate on the same basis of the general principles of international economic law.<sup>43</sup> But the most important distinction between the old and new treaty would be that the new treaty is emanating from African initiative and commitment. This basically means that the States parties to the treaty will not feel that the treaty did not create equal rights and opportunities for them all. Once a State is a party to a treaty which it has entered into freely, then there is a good chance that such a treaty will survive all pressures which may occur. In

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43. See Milan Sahovic, Principles of International Law Concerning Friendly Relations and Co-operation, (Belgrade, N.Y. 1972); William J. Davies, "Politics, Perception and Development Strategy in Tropical Africa", in The Journal of Modern African Studies, Vol.13, No.1, (London, 1975), pp.35-53; R.B. Seidman, "Law and Economic Development in Independent, English-Speaking Sub-Saharan Africa", in Africa and Law, (Ed. by T. Hutchinson, Madison Wisc., 1968); G. Myrdal, Economic Theory and Underdevelopment Regions, (London, 1957); S. Metzger, Law of International Trade: Documents and Readings, in 2 volumes, (Washington, 1966)



fact, to stress the importance of this principle of free exercise of a State's economic sovereignty, the U.N. Economic Commission for Africa is flexible in its approach towards the new economic organisation. The Commission would prefer to take over the new organisation's institutions and run them, but suppose the government of a constituent State does not favour turning a body over completely to the new organisation, E.C.A. will provide the additional facilities necessary, and leave the institution to serve the organisation, while being in the hands of the government of the particular sub-regional State.<sup>44</sup>

2. West African economic co-operation: Treaty of the Economic Community of West African States (ECOWAS)<sup>45</sup>

The preamble of the Treaty talks inter alia about the conviction of the member States in the promotion of

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44. See O.C. Eze, The legal status of foreign investments in the East African Common Market, (Leyden, 1975); M. Hodges, Multinational Corporations and National Governments: A case study of the United Kingdom's Experience 1964-1970, (Hampshire, 1977); D.W. Bowett, The Law of International Institutions, 3rd Ed., (London, 1975); T.V. Sathyamurthy, The politics of international co-operation contrasting conceptions of UNESCO, (Geneva, 1964); C. Shaw, Legal problems in international Trade and Investment, (N.Y. 1962); S. Sucharitkul, State immunities and trading activities in international law, (London, 1959); G.O.J. Lissitzyn, International Law: Today and Tomorrow, (N.Y. 1965).

45. See "Treaty of the Economic Community of West African States, of 28 May, 1975", in I.L.M., Vol. 14, 1976, pp. 1200-1210. The Treaty is deposited with the Federal Government of Nigeria; West African States: Articles of Association for the Establishment of an Economic Community for West Africa, signed 4 May, 1967, in I.L.M., Vol. 6, 1967, p. 776; T.O. Alias, Modern Law of Treaties, (N.Y., 1976).

harmonious economic development of their countries which calls for effective economic co-operation largely through a determined and concerted policy of self-reliance. It also mentions that the member States recall the Declaration of African Co-operation, Development and Economic Independence adopted by the Tenth Assembly of Heads of State and Government of the Organisation of African Unity. In the background of economic co-operation of the sub-region is the recognition that progress towards economic integration requires an assessment of the economic potential and interests of each state plus the recognition that forms of bilateral and multilateral economic co-operation which already existed in the area give hope for wider co-operation. Thus, in view of the need for economic co-operation, the West African countries decided to create a legal framework<sup>46</sup> of an instrument regulating the promotion of economic self-determination of the sub-region.

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46. See V.A.S. Muhammad, Legal framework of World Trade, (London, 1958); P. Reuter, International Institutions, (London, 1958); M. Sorenson, Manual of Public International Law, (N.Y. 1968); G. Schwarzenberger, Economic World Order? A Basic Problem of International Law, op.cit., Ch.1, above; Id., International Law and Order, (London, 1971); Id., A Manual of International Law, (London, 1947); Id., A Manual of International Law, (6th Ed. London, 1976); H.A. Marshall, Annual survey of African Law, Vol.5, 1971, and Vol.6, 1972, (London 1971 and 1972); A.M. Akiwumi, "Judicial aspects of economic integration treaties in Africa", in Colloquium 1971, (23-25 VIII): Legal aspects of economic integration, (Leyden, 1972), pp.27-99; Guinea-Ivory Coast-Liberia-Sierra Leone: Agreement to create an Interim Organisation with a view to the establishment of a permanent organisation for West African Economic Co-operation, 26 May, 1965, in U.N.T.S., Vol.559, p.273.



Article 1 of the Treaty establishes membership of the Community. It states that "By this Treaty the High Contracting Parties establish among themselves an Economic Community of West African States (ECOWAS), hereinafter referred to as "the Community", paragraph 1. The High Contracting Parties referred to in the Treaty are Dahomey; Gambia; Ghana; Guinea; Guinea Bissau; Ivory Coast; Liberia; Mali; Mauritania; Niger; Nigeria;<sup>47</sup> Senegal; Sierra Leone; Togo; and Upper Volta. These fifteen States constitute what have been traditionally known as the French-speaking and English-speaking countries of West Africa. Before 1975 these two groups of West African Countries<sup>48</sup> had existed as two different economic groupings of the sub-region. When they gained their political independence, the former French West African colonies formed different types of economic alliances from those formed by former British colonies. In the financial area, for instance, they created in 1967, the French West African Currency, operating within the West African Monetary Union (UMAO). The West African Monetary Union established in 1962 included all French-speaking countries with the exception of Guinea and Mali, which left the Union later, which two countries have established central banks and national currencies.

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47. See G. Agboola, "Nigeria and the World: A growing internal stability, wealth and external influence", in Journal of International Affairs, Vol.29,1975, pp.155-165; African Development, Vol.10,1976, "Nigerian Economic Survey".

48. See U.N. Document No.E/CN/14/370, Sales No.66.II.K3, Economic Survey of Africa, Vol.1, "Western Sub-Region", (N.Y.1950); A. Rake, "West Africa Divided but hopeful", in The Banker, Vol.26,1976, pp.279-305.

After independence, the former British colonies established separate central banks, and the common currency, the West African pound, was to be replaced by national currencies. Now that these countries of two West African economic groups have joined to form one economic union, economic problems have arisen, which need to be eliminated if ECOWAS is to bring integration in the sub-region.

Under Article 2 (1) of the Treaty, the aims of the Community are to promote co-operation and development in all fields of economic activity particularly in the fields of industry, transport, telecommunication, energy, agriculture, natural resources, commerce and monetary and financial matters.<sup>49</sup> Paragraph (2) provides that the Community will by stages ensure: the elimination of customs duties and other trade barriers; abolition of quantitative and administrative restrictions on trade among the parties; establishment of a common customs tariff and a common commercial policy towards third parties; abolition of the obstacles to the free movement of persons, services and capital; harmonisation of the agricultural policies and the promotion of common projects in the fields of marketing, research and agro-industrial enterprises; implementation of schemes for the joint development of transport, communication, energy, and other infrastructural facilities; co-ordination of economic and industrial policies and the

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49. See L. Stein, "Developing Countries and International Trade: An Alternative View", in Journal of African Studies, Vol.8, 1970, p.605.



elimination of disparities in the level of development; establishment of a common fund for co-operation, compensation and development; and promotion of such other activities as may further the aims of the Community.<sup>50</sup>

As a general undertaking, Article 3 provides for the Member States to make every effort to plan and direct their policies with a view to creating favourable conditions for the achievement of the aims of the Community. Each Member State has to take direct steps to ensure and secure the enactment of such legislation as is necessary to give effect to the Treaty. So we see that the Treaty provides that in order to succeed in the implementation of the aims of the Community, every Member State must undertake to put into effect every provision of the Treaty. But the Treaty also provides for the machinery to give effect to its provisions. The institutional machinery of the West African Community is different from that used by the East African Community.

Chapter II of the Treaty which describes the institutions of the Community stipulates in Article 4 (1) that the institutions of the Community are: the Authority of Heads of State and Government; Council of Ministers; Executive Secretariat; Tribunal; and Technical and Specialised Commissions on trade, customs, immigration, monetary matters, payments, industry,

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50. See S.J. Rubin, "Development in the law and institutions of international economic relations: The multinational enterprises at bay", in A.J.I.L., Vol.68, 1974, p.475.

agriculture, and national resources, transport, telecommunications and energy, and social and cultural affairs. The same paragraph also mentions that the Authority may establish such other Commissions or bodies as may be deemed necessary, or as provided for by the Treaty. Unlike the East African, the West African Treaty does not provide for a Common Market or Common Market Tribunal, instead it provides for the Trade Commission.<sup>51</sup> Instead of the Financial Council which is in the East African Treaty, the West African Treaty provides for a Monetary Commission which presumably handles all financial matters.<sup>52</sup> Payments between Member States are dealt with by a Payments Commission whose functions would be performed by the Financial Council under the East African Treaty. There is no Economic Consultative and Planning institution comparable to that provided for in the East African Treaty; this function comes under "Industrial Development and Harmonisation" (Chapter V of the West African Treaty).

The significance of the West African Treaty is

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51. See Report Submitted by Nigeria and Guinea Priority Studies for West African Regional Group, (Lagos, 1975); U.N.E.C.A., Economic Survey of Africa, Vol.3, 1971, (N.Y. 1971); U.N. Dept. of Economic and Social Affairs World Economic Survey 1969-70 - The Developing Countries in the 1960's: The problem of appraising progress, (UN. N.Y. 1971); Id., World Economic Survey 1968 - Some issues of development policy in the coming decade, (UN. N.Y. 1969); U.N.E.C.A., Regional Report, (E/COND.70/7), (N.Y. 1977).
52. See African Development, Dec. 1970, "Anatomy of African Exchange Control: A Special Survey"; The International Lawyer, Vol. II, No. 3, 1977, Reports: "The Activities of International Economic Organisations", p. 583; R.A. Mundell The Monetary Mechanism of International Adjustment: International Economics, (London, 1967).



that it covers a wide spectrum of economic issues. It is a Treaty that can be very widely interpreted to suit the economic aspirations and objectives of Member States.<sup>53</sup> In my view, the West African Treaty for co-operation allows considerable room for implementation of the aims of the Community by the Commissions, which in their own spheres of functioning touch on some fields not specified in the Treaty but presumed to be within their area and competence. Unlike the West African Treaty, the Treaty for East African Co-operation is, in essence, very narrow and can be interpreted as limiting to specific functions certain organs of importance.<sup>54</sup> For example the "Research and Social Council" which under the West African Treaty nomenclature is the Social and Cultural Affairs Commission: the Commission unlike its counterpart, is designed to cover a very wide area of operation. Articles 5 to 8 describe the inner organs of the West African Community. The Authority of Heads of State and Government as the principle governing institution of the Community, has the responsibility to direct and control the performance of the executive functions of the Community for the progressive development of the Community and the achievement of its aims. The Authority which meets at least once a year, determines

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53. See M.A. Ajomo, "Regional Economic Organisations: the African Experience", in International and Comparative Law Quarterly, Vol.25, 1976, pp.58-101; J.S. Magee, "E.A.C. and the Paradox of African Co-operation", in International Conciliation, No.580, (N.Y. Nov.1970).

54. See E. Uskor, "Progressive development of trade law: A new programme of the U.N.", in Indian Journal of International Law, Vol.7, 1967, p.159; F.A. Mann, Studies in International Law, (London, 1973).

its own procedure for the convening of its meetings, the conduct of its business thereat, and the choosing of a Chairman annually from among the Member States. The decisions and directions of the Authority are binding on all the institutions of the Community.

The Council of Ministers which consists of two representatives from each Member State has inter alia the responsibility: to keep under review the functioning and development of the Community; make recommendations to the Authority on matters of policy; give directions to all subordinate institutions; and exercise such other powers and perform any other necessary duties in conformity with the provisions of the Treaty. The decisions of the Council of Ministers are binding on all subordinate institutions unless otherwise determined by the Authority. As a matter of procedure, the Council meets twice a year and one of its meetings is held immediately preceding the annual meeting of the Authority. Whenever necessary, the Council may convene extraordinary meetings. In the case of an objection being recorded on behalf of a Member State to a proposal submitted for the decision of the Council of Ministers, such a proposal shall, unless the objection is withdrawn, be referred to the Authority for its decision. Thus the Authority has power over "all institutions of the Community".

According to Article 7 of the Treaty "The Authority shall determine the procedure for the dissemination of its decisions and directions and those of the Council



of Ministers and for matters relating to their coming into effect." It is clear therefore that the Authority determines how its decisions and directions and those of the Council of Ministers shall be adopted. It also determines any other matters relating to such questions as: when and how these decisions and directions shall come into force. There is a Secretariat headed by the Executive Secretary who is appointed for a term of four years and eligible for re-appointment for another four-year term only. The duties of the Executive Secretary, who is responsible for the day to day administration of the Community and all its institutions, include: assisting the institutions of the Community in the performance of their functions; keeping the functioning of the Community in continuous examination and reporting the results of such examination to the Council of Ministers; and undertaking such work and duties and performing such services relating to the aims of the Community as he may be assigned by the Council of Ministers. He may also recommend to the Council of Ministers any measures which may assist in promoting the efficient and harmonious functioning and development of the Community.

Under Article II the Tribunal of the Community shall ensure the observance of Law and Justice in the interpretation of the provisions of the Treaty. The other responsibility of the Tribunal is to settle any disputes that may be referred to it in accordance with Article 56 of the Treaty. So the law provides explicitly

that, after the Tribunal has examined any disputes and passed judgement, the Parties may not take the disputes any further. There is therefore no appeals procedure provided under the Treaty.

Trade liberalisation is dealt with under Article 12: "There shall be progressively established in the course of a transitional period of fifteen years from the definitive entry into force of this Treaty, ..... a Customs Union among the Member States." The Union shall aim at the elimination of customs duties or any other charges which may have equivalent effect on imports. There shall also be an abolition of quotas, quantitative or similar restrictions or prohibitions and administrative obstacles which might inhibit trade among the Member States. Article 13 describes customs duties in a very detailed manner.

In respect of all the goods imported into the Community from third countries, the Member States agreed to the gradual establishment of a common customs tariff. Paragraph 2 of Article 14 gives specific time in which the Community must achieve the abolition of the existing difference in their external customs tariffs. In the course of the same specified period, the Commissions of Customs, Immigration, Monetary matters and Payments will ensure the establishment of a common customs nomenclature and customs statistical method for all the Member States. Goods originating from Member States, which are defined by a separate protocol annexed to the Treaty, are accepted as eligible



for Community tariff treatment. But they must be consigned to the territory of the importing Member State for them to fall under the Community tariff system.

The Treaty contains the Most-Favoured-Nation Treatment clause.<sup>55</sup> According to Article 20 (1): "Member States shall accord to one another in relation to trade between them the most-favoured-nation treatment and in no case shall tariff concessions granted to a third country under an agreement with a Member State be more favourable than those applicable under this Treaty." However, whenever there is an agreement, copies of it must be transmitted by the Member States party to that agreement to the other Member States. Under the Treaty if a Member State is a party to an agreement with a third country, under which tariff concessions are granted, such an agreement shall not derogate from the obligations of the Member State to the Community. On the question of re-exportation of goods and transit facilities, it is provided under Article 22:

1. Where customs duty has been charged and collected on any goods imported from a third country into a Member State such goods shall not be re-exported into another Member State except as may be permitted under a Protocol to this Treaty entered into by the Member States.

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55. For a detailed discussion on the MFN clause, see G. Schwarzenberger, "The most-favoured-nation standard in British States practice", in British International Yearbook, 1945, p.96; Q. Wright, "The most-favoured-nation clause", in A.J.I.L., Vol.21, 1927, p.760; H.M. Catudal, "The most-favoured-nation clause and the courts", in A.J.I.L., Vol.35, 1941, p.41; L.G. Jahnke, "The European Economic Community and the most-favoured-nation clause", in Canadian Yearbook of International Law, Vol.1, 1963, p.252.

3. Each Member State, in accordance with international regulations, shall grant full and unrestricted freedom of transit through its territory of goods proceeding to or from a third country indirectly through that territory to or from other Member States; and such transit shall not be subject to any discrimination, quantitative restrictions, duties or other charges levied on transit.

Notwithstanding paragraph 3 above, goods in transit are subject to the customs laws, and are liable to the charges usually made for carriage and for any services which may be rendered, provided that such charges are not discriminatory.

The Treaty however, allows the Member States freedom to restrict the transfer to them of goods imported from the third country, by a system of licencing and controlling importers or by any other means.<sup>56</sup> But this freedom may only be exercised in a case where goods restricted have failed to be accepted as originating in a Member State.

One interesting matter is that of compensation for loss of revenue which is paid to a Member State which has suffered loss of import duties as a result of the application of provisions on "Customs and Trade Matters". Under Article 25 of the Treaty, the Council of Ministers determines the compensation to be paid on the basis of reports of the Executive Secretariat and recommendations by the appropriate Commissions or Commission. The methods of compensation assessment of

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56. See L.W. Malville, Precedents on Intellectual Property and International Licensing, (London, 1972); M.A.G. Meerhaeghe, International Economic Institutions, (London, 1959); S.J. Wells, International Economics, (London, 1973).



the loss of revenue are set out in a protocol annexed to the Treaty. Articles 29, 30 and 31 set "three stages" under which industrial development and harmonisation is to be achieved. Under Stage 1 the Members have undertaken to:

- (a) furnish one another with major feasibility studies and reports on projects within their territories;
- (b) furnish one another, on request, with reports on the performance of prospective technical partners who have developed similar projects in their territories;
- (c) furnish one another, on request, with reports on foreign business groups operating in their territories;
- (d) furnish one another, on request, with reports on their experiences on industrial projects and to exchange industrial research information and experts;
- (e) commission, where appropriate, joint studies for the identification of viable industrial projects for development within the Community; and
- (f) finance, where appropriate, joint research on the transfer of technology and the development of new products through the use of raw materials common in some or all of the Member States and on specific industrial problems. (Article 29).

Stage II is concerned with the "Harmonisation of Industrial Incentives and Industrial Development Plans". It is stated in Article 30 that Member States undertake to:

- (a) harmonise their industrial policies so as to ensure a similarity of industrial climate and to avoid disruption of their industrial activities resulting from dissimilar policies in the fields of industrial incentives, company taxation and Africanisation; and
- (b) co-operate with one another by exchanging their industrial plans so as to avoid unhealthy rivalry and waste of resources.

Stage III is devoted to "Personnel Exchange, Training and Joint Ventures." According to this stage, Member States undertake to exchange skilled, professional and managerial personnel in the operation of projects; provide places in their educational and technical institutions for the training of the Community's citizens; and engage in joint venture projects, including projects which might have been initiated by other Member States.

In order to fulfil the objectives of the Stages set above, the West African countries have been urged by Professor Adedeji, the Executive Secretary of the U.N.E.C.A. to visualise "Economic Co-operation .... not merely as a means for market expansion but primarily as an instrument for the transformation of the structure of production and distribution".<sup>57</sup> It remains to be seen how these countries will in practice carry out their obligations in implementing the Treaty of co-operation in the areas described above. On the other area of economic co-operation namely: "Co-operation in Monetary and Financial Matters", the Treaty contains four Articles, i.e. Article 36, 37, 38 and 39. Article 36 concerning co-operation in monetary and fiscal matters stipulates that it is the responsibility of the Trade, Customs, Immigration, Monetary and Payments Commissions, inter alia, to: make recommendations on the harmonisation of economic and fiscal policies; give their constant attention to the maintenance of an equilibrium balance

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57. See Daily Times, Tuesday, 24 August, 1976, Lagos, Nigeria. "ECOWAS: We need builders not critics now".



of payments; and examine developments in the economies of the Member States.<sup>58</sup>

Settlement of payments between Member States is made according to recommendations by the Commission concerned to the Council of Ministers, establishing in the short term bilateral systems for the settlement of accounts and in the long term a multilateral system<sup>59</sup> that will encompass the whole sub-region. For the purpose of overseeing the system of payments within the Community, Committee of West African Central Banks has been established, consisting of the Governors of the Central Banks of the Member States, or any other designated persons. The Committee has the responsibility to make recommendations to the Council of Ministers from time to time on the operation of the clearing system of payments and on other monetary questions of the Community.

For the purpose of ensuring the free movement of capital and in connection with any other capital issues, Article 39 provides for the establishment among the Member States, of a Capital Issues Committee consisting of one representative from each Member State. In the

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58. See S.J. Rubin, "Development in the law and institutions of international economic relations", in A.J.I.L., Vol.70, 1976, pp.73-91; U.N. Dept., of Economic and Social Affairs, Economic Survey of Africa Since 1950, (U.N., N.Y., 1959); U.N. Commission on International Trade Law Yearbook, 1977, Vol.III, Sale No.E.78, (U.N., N.Y., 1977); W.G. Friedmann, The Changing Structure of International Law, (London, 1964) Id., International Law: Cases and Materials, (Washington, 1969).

59. See W.A. Chudson, "The International Transfer of commercial technology to Developing Countries", UNITAR Research Report No.13, (N.Y., 1971); M. Shaw, International Report of the Committee on International Economic Organisation, in International .....

exercise of its functions, the Committee shall:

- (a) seek to achieve the mobility of capital within the Community through the interlocking of any capital markets and stock exchange;
- (b) ensure that the stocks and shares floated in the territory of a Member State are quoted on the stock exchange of the other Member States;
- (c) ensure that nationals of Member States are given the opportunity of acquiring stocks, shares and other securities or otherwise investing in enterprises in the territories of other Member States;
- (d) establish a machinery for the wide dissemination in the Member States of stock exchange quotations of each Member State;
- (e) organise and arrange the quotation of prices, timing, volume and conditions of issue of securities of new enterprises in the Member States;
- (f) ensure the unimpeded flow of capital within the Community through the removal of controls on the transfer of capital among the Member States in accordance with a time-table, to be determined by the Council of Ministers; and
- (g) seek to harmonise the rates of interests on loans prevailing in the Member States so as to facilitate the investment of capital from a Member State in profitable enterprises elsewhere within the Community.

Surely it is unrealistic to think that economic integration in the West African sub-region can be achieved smoothly. As have been already pointed out above, the two economic groups are coming together, but the obvious problem of their former alliance with either the French or the British will linger for quite some time to come. Furthermore, colonial influence like that found in the East African Community has to be discouraged if the new economic alliance of West African countries is to survive.

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59. Continued ...

Lawyer, Vol.9, No.4, 1975; M.P. Furmston, Cheshire and Fifoot's Law of Contract, (London, 1976); D.R.E. Edward Cases and Materials in International Law, (N.Y., 1955).



Taking account of the size of the new organisation, the West African Community has greater and more complicated problems to tackle than the ones encountered by its East African counterpart. West African States will need determination to foster their economic union and achieve economic self-determination within the framework of an integrated economic organisation.<sup>60</sup>

3. Central African economic co-operation:  
Convention establishing Central African  
Economic and Customs Union (UDEAC)

The Convention Establishing A Central African Economic and Customs Union<sup>61</sup> was signed on 4 December, 1964, by Chad, Cameroon, Central African Republic, Congo and Gabon. According to Article 3 of the Convention, the decision-making institution is the Council of Heads of State, which meets as often as necessary but at least once every year.

The Council, being the supreme organ of the sub-regional economic organisation, may:

1. determine and co-ordinate the Customs and economic policy of the Member States;

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60. See Akiwumi, "Judicial aspect of economic integration treaties in Africa", op.cit. above; Green, "Multi-purpose Economic Institutions in Africa", op.cit. above; S. Minerva, An Introduction to International Law, (London, 1970); T.R. Graham, "The U.S. Generalised System of Preferences for Developing Countries: International Innovation and The Art of the Possible", in A.J.I.L., Vol.72, 1978, pp.513-541; U.N. Economic Commission for Latin America, Economic Survey of Latin America 1976, (U.N. Santiago, 1977).

61. See Wionczek, Economic Co-operation in Latin America, Africa and Asia, op.cit., "Convention establishing Central African Economic and Customs Union (UDEA)"; U.N.E.C.A., Report of the E.C.A. Mission on Economic Co-operation in Central Africa, (N.Y. 1971); Charter of the African and Malagasy Common Organisation, 27 June, 1966, in U.N. Treaty Series, Vol.637, p.247.

2. have the power to make decisions and to supervise the Management Committee;
3. establish its own rules of procedure and those of the procedure of the Management Committee;
4. set up the annual contribution of the Member States and draw up the budget of the Union;
5. decide upon tariff negotiations with the third countries and the application of the general tariff;
6. decide in the last resort on all questions concerning which the Management Committee has not been able to reach a unanimous decision.

When decisions of the Council concerning economic, customs and fiscal legislation are to be taken, power is delegated to the National Legislative Assemblies in accordance with the institutional rules of each State. This means that the Council, as an institution, is not a legislative body and therefore does not have the power to formulate laws in the areas mentioned in this paragraph. The Treaty provides also for a Management Committee composed of two members per State. Under Article 17, the Committee's competence includes the following subjects: tariff and statistical nomenclature, common external customs tariff, tariff or duties and fiscal charges on importation, single tax, common code, customs legislation and regulation, harmonisation of internal taxes, Investment Code, harmonisation of industrialisation projects, development plans and transport policy; consultation regarding exit duties, export information on products of common interest as well as on wage and social systems.<sup>62</sup>

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62. See Akiwumi, "Judicial aspects of economic integration treaties in Africa", op.cit.; McGowan, "Economic Development Performance in Black Africa", op.cit., Central African Republic-Republic of Congo (Braz)- ...../



On Financial Provisions, the Treaty states in Article 25 that the budget of the institutions of the Union shall be drawn up annually by the Council of Heads of State. The expenditure of the Union shall be covered by the equal contributions of the Member States. Thus we see that the Member States contribute financially to meet the expenses of the economic Union in the sub-region.

Articles, 42, 43 and 44 are devoted to the question of harmonisation of internal fiscal systems. Under Part I of Article 42, the Management Committee examines the conditions in which the legislation of the Member States in respect of direct taxes, and, if necessary indirect taxes not levied by customs administration, can be harmonised in the common interest. To effect that rule, the Council of States, have the power to draw up directives for the approximation of laws and regulations.<sup>63</sup> The inclusion of the provision in the Investment Code provides a unique situation in the Central African economic sub-regional organisation.

In accordance to the provisions of the "Convention on Investment", the Central African States have adjusted their national legislation concerning economic matters connected with common investments in the sub-region so that they are in line with this Union's Investment Code.

62. Continued .....

Gabon-Chad: Central African Economic and Customs Union, Convention Investment, in I.L.M., Vol.7, 1968, p.221.

63. See B. Broms, Equality of States as applied in international organisations, (Helsinki, 1959); U.N.E.C.A., Economic Co-operation and integration in Africa: Three Case Studies, op.cit.; Id., Economic Bulletin for Africa, "Investment Laws and Regulations in Africa", op.cit.

This is provided for under Article 46 which stipulates as follows: "The provisions of the national Codes, as submitted to the Management Committee and, where applicable, harmonised according to its directives may not be further modified unilaterally."

The Treaty provides also for co-operation in the apportionment of industrialisation projects, harmonisation of development plans and transport policy. Article 47 stipulates:

The High Contracting Parties agree to harmonise their industrialisation policies, development plans and transport policies with a view to promoting the balanced development and diversification of the economies of the Member States of the Union, within the framework which would permit the multiplication of exchanges between the States and an improvement in the living standards of their peoples.

The Member States have undertaken to communicate to each other documents indicating their respective economic situations and their development plans or programmes and annual reports on the execution of such plans and programmes.<sup>64</sup> On transport and movement they undertook to inform each other on plans for improving and developing communication routes which may be of interest to one or more States. National regulations on transport and movement are to be co-ordinated in the interests of all Member States. In the field of industrial co-operation, Article 51 lays down specific rules of conduct by the

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64. See J.L. Brierly, The Basics of Obligation in International Law, (Oxford, 1958); U.N.E.C.A., World Plan of Action: African Regional Plan for the application of Science and Technology to development, op.cit.; Id., Doc.E/CN.14/CTNC/2: Transitional Corporations, issues involved in the formation of a Code of Conduct, 1977.



Member States. It states that a distinction must be made between the following:

- (a) industries mainly devoted to exports outside the Union;
- (b) industries affecting the market of a single State for which no economic, fiscal or customs advantages are requested from the other States of the Union;
- (c) industrial projects affecting the market of a single State which concern a production existing already in another State of the Union or the creation of which is also envisaged in the development plans or programmes of another State of the Union;
- (d) industrial projects, the market for which is and will remain limited to two States, for which harmonisation can be sought as between those two States;
- (e) industrial projects affecting the market of more than two States and for which harmonisation can be sought within the Union.

The above provisions are sought to apply to all industrial undertakings including those having the status of joint-venture corporations or State agencies.<sup>65</sup> This means that the provisions are meant to regulate joint venture corporations and any other State agencies involved in the promotion of industrial development affecting the whole sub-regional economic organisation.

One most interesting provision in the Convention is that of single tax. Article 59 stipulates that the

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65. See W.G. Friedmann, Joint International Business Ventures in Developing Countries: Case Studies and Analysis of Recent Trends, (N.Y. 1971); U.N.E.C.A., Directory of Intergovernmental Co-operation Organisations in Africa, (Addis Ababa, 1977).

single tax (taxe unique) system shall apply to all domestic industrial production whose market extends or is likely to extend to the territory of several Member States. Article 60 provides that the single tax shall not include the following: "duties and charges applicable upon importation of raw materials and essential products used in industry for the manufactured products in the form in which they enter into trade; all internal charges on raw materials and essential products used in industry as well as on manufactured products." It is clear that the Parties are interested in imposing taxes on certain products and on raw materials vital to the promotion of certain industries considered of great importance by Member States.

This provision concerning a single tax system is a rather rare practice by an inter-State economic organisation. Its inclusion in the Convention reveals the very close co-operation between the parties.<sup>66</sup> Apart from this Central African Economic Convention, no other African sub-regional economic legal instrument contains a legal provision prescribing a single tax system. Having analysed the legal instruments employed by the Central African States in order to promote and strengthen their economic co-operation, and thus in the end to promote their economic independence, it is useful to list those legal instruments of their economic sovereignty, namely: Convention Establishing a Central African Economic and

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66. See Ajomo, "Regional Economic Organisation: The African Experience", op.cit.; P. Tobin, "Common Markets in Africa", in African Development, Vol.1, 1966, p.14.



Customs Union; Convention on the Treatment of Investments in the Equatorial Customs Union; and Act Codifying and Regulating the Single Tax (Taxe Unique) in the States of Equatorial Africa.

There are other economic groupings pertaining to certain States of the Central African sub-region. These are: Union of Central African States (UEAC); and the Economic Community of the Great Lake Countries (GEPGL). The UEAC which comprises Zaire and Chad was established in 1968. Although trade barriers are still maintained, trade between the partner-States has in fact increased.<sup>67</sup>

The Economic Community for the Great Lake Countries comprises Burundi, Rwanda, and Zaire. It was established by a Convention signed in 1970. But there have as yet been no measures taken by the parties to give effect to that legal instrument.

In my opinion, the Convention for Central African Economic and Customs Union is a better legal instrument than those of other African sub-regional economic organisations because it provides for the formulation of uniform laws, by the Member States, so as to regulate their economic activities within the framework of the Union.

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67. See U.N.E.C.A., Foreign Trade Statistics for Africa: Series A, Direction for Trade Exchange Par Pays, No. 17, (UN. N.Y. 1971); Id., Foreign Trade Statistics for Africa: Series B, Trade and Commodity, No. 21, (UN. N.Y., 1972).

4. North African economic co-operation:  
Legal instruments establishing economic  
co-operation among the Maghreb States

Sub-regional economic co-operation among the North African States was established in October 1964 by the Protocol<sup>68</sup> forming an Agreement between the Maghreb countries. The Protocol is a legal instrument which provides for co-operation in the following fields: planning; industrial harmonisation; mines and energy; commercial relations and services; manpower; and financing of development. The Protocol also provides for the establishment of a Maghreb Permanent Consultative Committee (CPCM). The Committee was then established in the same year (1964) by the Statute<sup>69</sup> of the Standing Consultative Committee.

The Standing Consultative Committee which has now developed into a Permanent Consultative Committee is a technical and consultative body responsible for studies related to the overall problems of economic co-operation and development in the Maghreb.<sup>70</sup> It also advises the Conference of the Ministers of Economic Affairs of the Member States on the steps to be taken in order to promote co-operation and to speed up the establishment of the Economic Community of the sub-region. The Committee

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68. See Wionczek, *Economic Co-operation in Latin America, Africa and Asia*, op.cit., Document 15: Protocol of the Agreement between Libya, Tunisia, Algeria and Morocco, signed at Tunis, on 1 October, 1964, pp.307-309.

69. See Id., Document 16: Status of the Standing Consultative Committee, pp.310-312.

70. See U.N.E.C.A., Economic Survey of Africa, Vol.II, North African Sub-region, 1968, op.cit.,



seeks a suitable economic foreign policy to be adopted by the members in their external relations, particularly with the E.E.C. Under the Statute of the Consultative Committee, the Permanent Committee is placed under the authority of the Conference of Ministers which is responsible for economic co-ordination; the Committee consists of a chairman and one representative from each Member State. The Chairman has the rank of Minister, (Article 1-4 of the Statutes). The Chairman is assisted by a Vice-Chairman, who is a representative of the country holding the Chairmanship.

The CPCM has a Secretariat which is headed by an Administrative and Financial Secretary appointed by the Chairman, (Article 5). The Secretariat has correspondents who are designated by the Governments in each Member State (Article 6). The seat of the Administrative and Financial Secretary is at Tunis, in Tunisia. The decisions of the CPCM and its budget are approved by the Conference of the Ministers of Economic Affairs of the Maghreb States (Article 10).

The CPCM<sup>71</sup> has several specialised bodies established under its aegis. These include: Centre for Industrial Studies of the Maghreb (CEIM); Committee on National Accounts and Statistics (COMASTAT); Committee for Electric Energy (COMELEC); Committee on Stockbreeding; Committee on Tourism (CMT); Committee on the Co-ordination of Postal and Tele-communications Services (CMCPT); and

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71. See U.N.E.C.A., Document (E/CN.14/CEC/1/Rev.2.)  
Directory of intergovernmental Co-operation Organ-  
isations in Africa, "Maghreb Permanent Consultative  
Committee (CPCM)", (Addis Ababa, 1976) pp.26-27.

Commission for Transport and Communications. This last Commission has its own subsidiary specialised committees namely: the Maghreb Committee on Air Transport (CMTA), Committee on Rail Transport (CTFM), Committee on Sea Transport (CMTM), and Committee on Road Transport (CMTR). There are other Committees, e.g. the Maghreb Committee on Employment and Labour (CMET); Committee on Standardisation (COMANOR); Committee on Insurance and Re-insurance (CMAR); and Committee on Pharmaceutical Products (CMPP).

Judging from the number of specialised subsidiary institutions which in fact, perform the tasks of implementing the two main legal instruments described in this section, it may be stated that the Maghreb sub-regional economic organisation is to date by far the most successful among the African sub-regional economic groupings. However, even though the organisation is older than its counterparts, a certain degree of inconsistency is observed. In 1970, Libya withdrew from the CPCM and other Maghreb institutions. From its date of establishment (1964) to May 1975, CPCM held only eight meetings of the Conference of Ministers of Economic Affairs. At its eighth meeting held in Algiers in May 1975, Mauritania was admitted to membership in the various Maghreb institutions. On 28 May the same year, Mauritania also signed the Treaty of the Economic Community of West African States (ECOWAS), thereby, legally committing itself to be bound by the legal instruments of the two sub-regional economic



organisations.<sup>72</sup> It may be said that a member of either the ECOWAS or Maghreb can acquire membership of the two organisations at the same time because the treaties establishing these organisations do not contain provisions restricting an African State which has expressed its wish to be a member, provided such a State is deemed to be constituted within the geographical area covered by such sub-regional grouping.

### Section C. Regional and inter-regional economic Co-operation

#### 1. Agreement establishing the African Development Bank (ADB)<sup>73</sup>

In the preamble of the agreement establishing the African Development Bank, it is stated that the Governments on whose behalf the Agreement was signed, were determined to strengthen African solidarity by means of economic co-operation between African States. The same also mentions the necessity of accelerating the development of the extensive human and natural resources; the need for a policy of co-ordination of national plans so as to promote a harmonious growth of African economies as a whole; and the expansion of African foreign trade, in particular, inter-African trade. It was recognised that

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72. See Akiwumi, "Judicial aspects of economic integration treaties in Africa", op.cit.; Ajomo, "Regional economic organisations: the African experience", op.cit.; Tobin, "Common Markets in Africa", op.cit.,

73. See Wionczek, Economic Co-operation in Latin America, Africa and Asia, "Agreement Establishing the African Development Bank", op.cit., pp.412-443; U.N.E.C.A., Agreement establishing the African Development Bank: Preparatory work, including summary records of the Conference of Finance Ministers, (Addis Ababa, 1964)

to establish a financial institution common to all African countries would contribute a certain degree of economic independence for the whole continent.

According to Article 1 of the Agreement, the "purpose of the Bank is to contribute to the economic development and social progress of its members - individually and jointly." And to implement the purposes of the Bank, its functions are:

- (a) to use the resources at its disposal for the financing of investment projects and programmes relating to the economic and social development of its members, giving special priority to:
  - (i) projects and programmes which by their nature or scope concern several members; and
  - (ii) projects and programmes designed to make the economies of its members increasingly complementary and to bring about an orderly expansion of their foreign trade;
- (b) to undertake, or participate in, the selection, study and preparation of projects, enterprises and activities contributing to such development;
- (c) to mobilise and increase in Africa, and outside Africa, resources for the financing of such investment projects and programmes;
- (d) generally, to promote investment in Africa of public and private capital in projects and programmes designed to contribute to the economic development and social progress of its members;
- (e) to provide such technical assistance as may be needed in Africa for the study, preparation, financing and execution of development projects and programmes; and
- (f) to undertake such other activities and provide such other services as may advance its purpose.

Paragraph (2) of Article 2, provides that the Bank in order to advance its purpose can seek co-operation with national, regional and sub-regional development institutions



in Africa, and with other outside international organisations pursuing a similar purpose. It can also seek co-operation with any other outside institutions concerned with the development of Africa.

Article 3 stresses the regional nature of the constitution of the Bank. It states that any African country which has the status of an independent State may become a member of the Bank, and can acquire such membership in accordance with paragraph 1 or paragraph 2 of Article 64 of the Agreement. Specifically on the geographical nature of the constitution of the Bank, paragraph 2 of Article 3 stipulates as follows: "The geographical area to which the membership and development activities of the Bank may be extended (referred to in this Agreement as "Africa" or "African" as the case may be) shall comprise the continent of Africa and African Islands." It may look as if there is a contradiction between Articles 2 and 3, regarding African nationalism. Article 2 leaves it open for the Bank to mobilise resources both from inside and outside Africa, and yet the latter categorically emphasises the point that membership of the bank is only open to countries of the African continent and Islands.

While it is reasonable for the African countries to declare a policy of non-alignment for political purposes, when it comes to the question of economic development and the financing of economic projects, since as the African countries lack capital they have no option but to support the Bank's co-operation with other

institutions and organisations interested in or participating in the development of the continent.<sup>74</sup>

Chapter II of the Agreement is devoted to Capital of the Bank. It contains such topics as authorised capital; subscription of shares; payment of subscription; special funds; ordinary capital resources; special resources; and separation of resources. The authorised capital stock of the Bank is 250,000,000 units of account. Under Article 6 it is the duty of each member initially to subscribe shares of the capital stock of the Bank. The initial subscription of every member consists of an equal number of paid-up shares.

Articles 12-22 of the Agreement deal with the operations of the Bank. In its operations, the Bank may provide or facilitate financing for any member, political sub-division or any agency thereof or for any institution or undertaking in the territory of any member as well as for international or regional agencies or institutions concerned with the development of Africa. The Bank carries out its operations in the following ways:

- (a) by making or participating in, direct loans out of:
  - (i) funds corresponding to its unimpaired subscribed paid-up capital and, except as provided in Article 20 of this Agreement, to its reserves and undistributed surplus; or out of
  - (ii) Funds corresponding to special resources; or

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74. See O.H. Abdel-salam, "The Evolution of African Monetary Institutions," in Journal of Modern African Studies, Vol. 8, No.3, 1970, p.339; S. Mundell, The Monetary Mechanism of International Adjustment: International Economics, op.cit; D.G. Clarke, The Monetary, Financial and Banking System in Zimbabwe, (UNCTAD, Geneva, 1979).



- (b) by making or participating in, direct loans out of funds borrowed or otherwise acquired by the Bank for inclusion in its ordinary capital resources or in special resources; or
- (c) by investment of funds referred to in sub-paragraph (a) or (b) of this paragraph in the equity capital of an undertaking or institution; or
- (d) by quaranteeing, in whole or in part, loans made by others, (Article 14).

Apart from the operational powers, Chapter IV of the Agreement deals with borrowing and other additional powers provided for the Bank. The Bank has the power to borrow funds from member countries or elsewhere; buy and sell securities it has issued or guaranteed or in which it has invested, but with the approval of the Member State in whose territory the securities are bought or sold; undertake such activities as the promotion of consortia for financing; provide all technical advice and assistance which it deems necessary and is in its interests. It can exercise any other such powers as are necessary or desirable in the furtherance of its purpose and functions, as described under the establishment agreement.

It can be concluded that irrespective of the fact that the Bank was established by African States, under the Agreement establishing it, the Bank is an independent development institution. It is most important that the Bank has this status, since it must not be under the direct influence of any particular Member State or States.

2. Arab Bank for Economic Development in Africa (ABEDA).

The Arab Bank<sup>75</sup> for Economic Development in Africa was established in July, 1973. It started its operations on 1 April, 1975. The main objective of the ABEDA, as an economic development Bank is to contribute towards African economic development by promoting and encouraging private Arab capital investment in the independent African countries who are not members of the Arab League.<sup>76</sup> Although the Bank finances wholly or partially, projects in the fields of industrial development, it is particularly concerned with development of infra-structures, agriculture, human resources, training and technical assistance. Thus the Bank encourages the exercise of economic self-determination in African States where such capital investments are operated.

The decision to establish the Bank was reached in Algiers at an Arab Summit held in 1973. The initial paid-up capital which is intended to rise to \$1 billion by 1980, was \$231 million.

Membership of the Bank is composed of members of the Arab League, including Mauritania, Tunisia, Morocco, Sudan, Libya, Egypt and Algeria. It is interesting to note that Palestine, which is not yet independent is also a member of the Bank. Judging from the composition

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75. See U.N.E.C.A., Doc.E/CN/14/CED/1/Rev.2, "Arab Bank for Economic Development in Africa (ABEDA)", op. cit.; McDaniels, International Financing and Investment, op.cit.

76. See New African Development, Feb.1977, "Africa and the Arabs", p.114; A. Nash, "International Association of Tropical Oil Producers", in African Development, Vol.2, No.1, 1968.



of its membership it appears that any Arab State may acquire membership status. The supreme authority of the Bank is the Board of Ministers of Finance of the Member States. There is an Administrative Council, headed by a Chairman who is also the President of the Bank. The Council is composed of 11 Member States: Algeria, Egypt, Iraq, Kuwait, Libya, Morocco, Palestine, Qatar, Saudi Arabia, Syria and United Arab Emirates. The Headquarters of the Bank is at Khartoum, in the Republic of Sudan.

On account of the fact that the Arab League, whose framework is used for economic co-operation by Arab oil-producing countries, is financing the development of certain sectors of the economies of African States, there can be no doubt that this kind of economic relationship promotes better and closer ties between African and Arab countries.<sup>77</sup>

### 3. Economic Co-operation between African States and E.E.C. under Lomé II<sup>78</sup>

The Lomé II Convention is an inter-regional legal instrument which is designed to promote economic co-operation between the European Economic Community (EEC) and African-Caribbean-Pacific (ACP) countries.<sup>79</sup> However, the

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77. See U.N.E.C.A., Doc.E/CN.14/669 (E/CN.14/ECO/113) Measures taken by ECA to promote co-operation between African regions and other developing regions, (Addis Ababa, 1977).

78. The Convention was signed at Lomé (Togo) on 31 October, 1979.

79. See THE COURIER: Africa-Caribbean-Pacific - European Economic Community, No.58 - Special Issue - November 1979, "The second ACP - EEC Convention signed at Lomé on 31 October, 1979", complete text, pp.1-111.

African States have sought economic co-operation with the EEC countries with the aim of promoting their economic self-determination. After having gained political independence African countries had to secure international markets for their primary commodities and other export products.<sup>80</sup> Being some of the world's main producers of primary commodities and other natural resources, African States are dependent on natural resources, as their primary, if not sole, revenue-earning resources.

Lomé Convention II is a successor to what has now come to be known as Lomé Convention I which was negotiated with the aim of replacing the previous legal instruments of association between African countries and the European Economic Community (EEC). Those previous legal instruments

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80. For the purpose of securing international markets for their primary commodities and other export products African countries participate in various producer-exporter groupings to strengthen their negotiating position. They also participate in the UNCTAD international trade negotiations: see B. Gosovix, UNCTAD, Conflict and Compromises: The Third World's Quest for an Equitable World Economic Order Throughout the United Nations, (London, 1972); J. Pincus, Trade, Aid, and Development: The Rich and Poor Nations, (N.Y., 1967); UNECA, Report of the African Ministerial Meeting Preparatory to UNCTAD III, Addis Ababa, 8-14 October, 1971, Doc. E/CN.14/545 (E/CN.14/UNCTAD III/PM/5); U.N.E.C.A., Economic Bulletin for Africa, Vol. 9, No.1, "The significance of the Second United Nations Conference on Trade and Development", pp.1-7; UNCTAD, Proceedings of the United Nations Conference on Trade and Development, 27 March - 15 June, 1964, Vols. 1-7, (U.N., N.Y., 1964); UNCTAD, Group of 77, Charter of Algiers, 24 October, 1967, in I.L.M., Vol.7, 1968; Id., Group of 77, The Lima Declaration, 7 November, 1971, in I.L.M., Vol.11, 1972; Id. Group of 77, The Manila Declaration and Programme of Action for Commodities, Trade Negotiations, Transfer of Resources and Technology, and Economic Co-operation, in I.L.M., Vol.15, 1976, p.414; UNCTAD, Report by the Secretariat: Review of International Trade and Development 1975, (U.N., N.Y., 1976); TD/B/530/Review 1, New directions in international trade and development policies, U.N., N.Y., 1976); TD/B/543. TD/B/C.1/182, Report of the .....



were the Yaounde Convention, and the Arusha Agreement<sup>81</sup> which had expired on 31 January, 1975. Babacar Ba, observed that:

The Yaounde Convention was certainly a complete arrangement, "quite satisfactory to ... (the parties) but the Convention which has just been agreed upon (referring to the Lomé Convention I) marks material progress over its predecessor because it contains two provisions of paramount importance. These are the export receipts stabilisation fund and industrial co-operation... those two provisions are enough in themselves

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80. Continued ....

Committee on Commodities on its 8th session, 10-21 February and 21-25 July, 1975, see Trade and Development Board Official Records, 15th Session, (Geneva, 1975); Gonzalo Martner, Producers-Exporters Associations of Developing Countries: An instrument for the establishment of a new international economic order, (Geneva, 1979); Ibid., "Annex III: The Statute of the Council of Associations of the Developing Countries Producers-Exporters of Raw Materials", pp. 151-155; John Edwards, (Commodities Editor), "COCOA MARKET: Uncertain prospects for producer pact", in Financial Times Friday December 21, 1979, p.25; Michael Prest, (Commodities Correspondent), "Today in Lusaka Cipec will take stock of world copper production", in The Times Monday July 21, 1980, p.21; Sean Conway, "Dispute between U.S. and producers threatens world tin agreement", in The Times Monday August 4, 1980, p.21; Iain Guest, "UNCTAD faces the strategy battle", in The Guardian Tuesday February 5, 1980, p.21; J. Edwards & Brij Khindaria, "Commodity stabilisation closer", in Financial Times Saturday June 28, 1980, p.1; The Times Wednesday August 6, 1980, "Mexico pact 'an example for Opec", p.20.

81. See C. Schiffman, "A negotiation and a convention", in THE COURIER, No.31 - Special Issue - March 1975, pp.3-6. In Africa the signatories to the Arusha Agreement were Botswana, Ethiopia, Gambia, Ghana, Guinea-Bissau, Kenya, Lesotho, Liberia, Malawi, Sierra Leone, Sudan, Swaziland, Tanzania, Uganda and Zambia; A.W. Sijthoff, The Lomé Convention and New International Economic Order, (Leyden, 1977); W. Brandt, Brandt Report, North-South: A Programme for Survival, (Pan Books, London/Sydney, 1980); Financial Times Wednesday March 21, 1979, "A North-South Compromise", p.21; Financial Times Tuesday August 26, 1980, "North-South battle likely in U.N. debate", p.2; Ibid., Editorial Comment, "The West's priorities", p.10. On economic co-operation in Latin America, see Francisco Orrego Vicuna, "Contemporary international law in the economic integration of Latin America: Problems and perspectives", Second Report, in Colloquium 1971, (23-25, VII) Hague Academy of International Law, (Sijthoff, Leyden, 1972), pp.101-186;...



to mark the new Convention as revolutionary".<sup>82</sup>

The first ACP-EEC Convention<sup>83</sup> was signed in Lome on February 28, 1975, and came into force on April 1, 1976, but its trade provisions were applicable from July 1, 1975. The first Convention which expired on March 1, 1980, was mainly based on: free access without reciprocity to the European market for products exported from the ACP States; a stabilisation fund to compensate the ACP

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81. Continued ....

Inter-American Institute of International Legal Studies, Instruments of Economic Integration in Latin America and the Caribbean, (N.Y., 1975); Rafael Vargas-Hidalgo, Instruments of Economic Integration in Latin America and the Caribbean, (Book Review), in Harvard International Law Journal, Vol.,17, 1976, pp.724-725.

82. See Babacar Ba, (Senegalese Minister of Finance and Economic Affairs, the then Chairman of the ACP Council of Ministers), "A revolutionary agreement", in THE COURIER, No.31, pp.6-7, loc.cit., above. See for an example East African Community - European Economic Community: Agreement of Association, 26 July, 1968, in I.L.M. Vol.8, 1969, p.741; J.D. Matthews, Association System of the European Community, (London, 1977); K.R. Simmonds, Sweet and Maxwell's European Community Treaty, (London, 1977); T. Butterworths, Introduction to the Law and the Institutions of the European Community, (London, 1973); U. Kitzinger, Europe's Horizons, (London 1975); B.W.T. Mutharika, "Trade and economic implications of Africa's association with the enlarged European Economic Community", in Economic Bulletin for Africa, Vol.10, No.2, 1974, pp.40-90; A.Akinsanya, "The European Common Market and Africa", in Pakistan Horizon, 28, 1975, pp.38-55; S. Uba, "Can Africa live without Europe?", in African Development, Vol.2, No.1, 1968, pp.3-8; P. Coffey, "The Lome Agreement and the E.E.C.: Implications and Problems", in The Three Banks Review, December, 1975, (Edinburgh, 1975), pp.44-50; World Survey, October, 1975, "Lome Convention (February 28, 1975): Origin and Negotiations", pp.1-17.

83. See THE COURIER: No.31 - Special Issue - March 1975, "ACP - EEC Convention of Lome", complete text, pp.1-84; Secretariat of the Council of the European Communities, ACP - EEC Lome Convention, Collected Acts; European Documentation: The European Community and the Developing Countries, periodical 1977/1.



States in the event of reduction in the receipts they derive from the export of their principal basic products (commodities); financial aid for ACP States, including U.A. 3,000 million from the European Development Fund (EDF) and U.A. 390 million from the European Investment Bank (EIB); industrial and technological co-operation, aimed to promote a better international division of labour on lines advantageous to the ACP States; joint institutions to supervise observance of the agreement and promote discussion between the groups of countries.

Lomé II which replaced Lomé I, will govern relations between the ACP-EEC States from 1 March, 1980 to 28 February, 1985. Like any agreement reached after long and difficult negotiations, Lomé II was a compromise that did not fully satisfy either party. The ACP States on their side have complained about the uncertainty of the benefits of the new convention. The EEC States argue that they have conceded far too much to the demands of the ACP countries. However, thanks to the well-balanced negotiations by the parties, it was possible for them to strike the compromise which resulted in the signing of the Convention. But there were problems right through the negotiations up to the last minute. The ACP States were determined to refrain from signing any text which they regarded as not reflecting their vision of co-operation with the EEC. The ACP States' main idea was and still remains that there has to be a redefinition and alteration of relations between them and the EEC. The ACP States are much concerned both with setting up a system of trade that is profitable to them, and with

ensuring certain economic rights for the developing countries. They feel that previous legal instruments providing for co-operation with Europe failed to meet their demands for a significant change in the European attitude towards the new and improved international economic order. But Lomé II may now be the basis for a process that could gradually bring about fundamental changes in the relation between the developed and the developing States.<sup>84</sup> Lomé II is said to be a major innovation<sup>85</sup> because it contains provisions concerning certain important sectors of the economies of both the ACP and EEC countries. One of the major innovations of the new Convention is the special system for ACP mineral products. The Sysmin, as the system is called, has two aims. One aim is to protect the existing facilities, and the other is to develop mineral and energy potentials.

As it is not the purpose of this work to discuss the Lomé Convention II<sup>86</sup> as a whole, it would suffice to analyse only some of its provisions which are most

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84. See Jean Durieux, "From Lomé I to Lomé II", in THE COURIER, No.58, p.2; Ibid., Editorial, pp.2-3; European Communities Commission: Background Report, ISEC/B33/79, "Lomé II: TERMS OF THE NEW CONVENTION", (20 Kensington Palace Gardens, London, 1979, September 5); EUROPE: Daily Bulletin, No.2751 (new series), Thursday, September 20, 1979, "Lomé 2: SOLUTIONS FOUND FOR MOST OF THE 18 POINTS THE ACP CONSIDERED OUTSTANDING", p.8; EUROPE: Daily Bulletin, No.2760, Wednesday 3 October, 1979, "EEC-ACP: O'KENNEDY, ST. JOHN AND CHEYSSON TO MEET IN NEW YORK TO FINALISE LOME II CONVENTION", p.4; European Community: Magazine, July-August, 1978, No.208, "GETTING READY FOR LOME II", pp.35-40.
85. See Alain Lacroix, "A major innovation", in THE COURIER, No.61, May-June, 1980, p.2.
86. See Thirteenth General Report on the Activities of the European Communities in 1979, "A.C.P. States and the October Lomé Convention", pp.259-266; Charles Harrison, "Lomé states press for more concessions from the Nine", in The Times, Friday May 9, 1980, p.10.



relevant to the development of economic self-determination of African States.<sup>87</sup> These are among others, provisions concerning: trade co-operation;<sup>88</sup> stabilisation of export earnings; improvement of ACP States capacity in exporting mineral products; promotion of the development of mining and energy projects; investment protection; industrial co-operation; agricultural co-operation; financial and technical co-operation (including taxation and customs); and institutions.

Under Trade Co-operation (Title I, Article 2(1) Lomé II) African and other ACP States enjoy the duty-free importation of practically all ACP products into the EEC. This means that products are imported duty-free from African and other ACP States into the EEC. In return the EEC does not ask ACP States for reciprocal preferences (Article 3), but only for the most-favoured-nation treatment in relation to other industrialised States. The aim here is to protect ACP industries from full scale competition with industries in EEC countries.

This EEC "open frontier" policy vis-a-vis ACP States is essential because the EEC countries must also import to enable their ACP partners to earn the necessary foreign exchange so that they can pay for their imports from the EEC States. Moreover, the EEC is highly dependant on outside sources for its mineral supplies and the ACP countries are among the main suppliers.

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87. Carol C. Twitchett, Europe and Africa: From Association to Partnership, (Guildford, Great Britain, 1978).

88. Amechi Unchegbu, "The Legal Framework of Trade relations between EEC and ACP Countries", in I.J.I.L., Vol.16, 1976, pp.1-43.

It is for this reason that the EEC must maintain a liberal trade policy towards the ACP countries. The developing countries already account for 20% of the EEC's trade. For instance, in 1978 the EEC took 43% of Kenya's exports. The EEC accounts for 51% of Kenyan imports, and the U.K. is the main supplier. Through trade co-operation within the framework of the Lomé Convention, African States are able to earn the necessary foreign exchange, and this in itself is a promotion of their economic self-determination. Foreign exchange enables the countries concerned to implement their development programmes and utilise their natural resources for the benefit of their people.

Under Title II of the Convention entitled "Export earnings from commodities", Chapter I is devoted to "Stabilisation of export earnings". The provisions under this stabilisation of export earnings system (Stabex) stipulate for the payment of compensation for a drop in the earnings from an ACP State's export of the agricultural products listed in Article 25 of the Convention. Under the Stabex system which operates as a kind of social security system in preventing sharp falls of national incomes, the recipient country repays the money in the event of improvement in the sales of the affected commodity.

During the fourth operational year of Lomé I, Stabex paid out compensation for the worst losses of export earnings suffered by the ACP States since the system came into operation. EEC took decisions on



transfers amounting to 149 144 248 EUA to 17 ACP States.<sup>89</sup> It may be said that this figure demonstrates the cover offered by the system and how well suited the mechanism is for the purpose.

The mineral products, mining and energy projects provisions contained in Lomé II (Title III) are major contributions towards the development of the economic independence of ACP countries, (African States included). Since these provisions were not included in Lomé I, their inclusion in Lomé II is a significant innovation with respect to the relations between the Contracting Parties.

During the negotiations of Lomé II the ACP States requested for the extension of the Stabex system, as it stood, to include mining products. This request was unacceptable to the EEC. However, a new system called Sysmin, was devised and adapted. This system takes account of the heavy dependence of certain ACP States on exports of mineral raw materials and also of the supply interests of the EEC countries. In contrast to the Stabex, the Sysmin is not automatically applicable. Assistance is decided on a case-by-case basis. The objective here being the necessity to maintain profitable mining capacity in the ACP State in question when the continued existence of such capacity is jeopardised as a result of natural disasters (force majeure), grave

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89. See THE COURIER, No.61, "Stabilisation of earnings", pp.9-10; THE COURIER, No.62, July-August, 1980, "The Stabex system in Lomé II", pp.30-36; European Communities Commission Background Report, loc.cit., p.2; European Communities Thirteenth General Report, 1979, loc.cit., pp.264-265; Lomé Convention I Title II, op.cit., pp.8-10.

political events or a fall in export earnings. Article 49 of the Convention stipulates that:

With a view to contributing towards the creation of a more solid basis for the development of the ACP States whose economies are largely dependent on the mining sector and in particular towards helping them cope with a decline in their capacity to export mining products to the Community and the corresponding decline in their export earnings, a system shall be established to assist these States in their efforts to remedy the harmful effects on their income of serious temporary disruptions affecting those mining sectors and beyond the control of the ACP States concerned.

According to Article 53 of the Convention, an ACP State may apply for aid from the EEC under the Sysmin system provided the concerned ACP State has during the preceding four years, derived at least 15% of its export earnings from products covered by Article 50 of the Convention.<sup>90</sup> Such application is examined by the Commission in conjunction with the ACP State concerned. The fact that conditions for aid have been fulfilled is established by common accord between the EEC and that ACP State. This gives the opportunity to the ACP State concerned to effectively present its case, as well as participate in taking the decision concerning the granting of the aid the ACP State is applying for.<sup>91</sup> Sysmin (further differs from Stabex in that it) provides for special agreements for the development of mining and energy

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90. The products covered by Article 50 are - copper, including associated production of cobalt; phosphates; manganese; bauxite and alumina; tin; iron ore; and iron pyrites.

91. For further references on the mineral products, mining and energy projects under Lomé II, see THE COURIER, No.61, loc.cit., p.10; ECC Background Report, loc.cit., pp.2-3; see also other COURIER issues.



potentials of ACP States. Under this system there is also the possibility of agreement on specific projects between the Community and an individual ACP State. It may be said that Sysmin provides for the improvement of the investment climate in the mining sectors of the concerned ACP States. By their very nature, such investment operations are long-term undertakings. It is therefore anticipated that the promotion of mining and energy projects will be of special importance during the operational period of the Convention.

Private investment is one of the prime factors for stimulating economic development, at least as far as the developing countries are concerned. Such investment not only promotes economic self-determination but can contribute considerably towards the emergency of technology and know-how in the African States and indeed in any other developing countries. Lomé II clearly reflects the importance of private investment for the industrialisation of ACP countries and the objective of promoting such investment by means of suitable measures. According to Article 60 of the Convention:

The Community and the Member States shall endeavour to implement measures to encourage their economic operators to participate in the industrial development efforts of the ACP States, and shall encourage such economic operators to comply with the development objectives and priorities and the appropriate laws and regulations of the ACP States.

The above cited provision makes it clear that the economic operators from the EEC States shall be encouraged to comply with the laws and regulations of the ACP host State. Article 61 develops this point further by stating

that each ACP host State should take necessary steps to promote effective co-operation with the Community, its Member States, or with economic operators or nationals of the EEC countries who comply with the development objectives and priorities of the host ACP States.

On the question of investment protection agreements, the Contracting Parties agreed that: "the treatment of investment coming from Member States to the ACP States shall be governed by the provisions of the joint declaration contained in Annex IX of the Final Act"<sup>92</sup> of the Convention. This joint declaration<sup>93</sup> contains provisions incorporating the "most-favoured-nation" (M.F.N.) clause: which states that when there is a bilateral investment agreement between a Community Member State and an ACP State, investments from all other Member States of the Community must enjoy similar treatment. However, in each case, this right must be given practical effect by means of a "bilateral inter-governmental Exchange of Letters or other appropriate form required by law of a Contracting State".<sup>94</sup>

Title VI of the Convention entitled "Agricultural co-operation", contains provisions reflecting the fact that up to the present time the majority of the ACP States are heavily dependent on agriculture for their overall economic development. These provisions underline the

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92. See Article 64 of Lomé Convention II .

93. See Annex IX: "Joint declaration on investments relating to Article 64 of the Convention".

94. See Ibid., paragraph 3.



unique significance of agricultural development as a matter of survival in African countries, and indeed in the developing world as a whole. Article 84 stipulates that:

1. The basic objective of agricultural co-operation between the Community and the ACP States must be to assist the latter in their efforts to resolve problems relating to rural development and the improvement and expansion of agricultural production for domestic consumption and export and problems they may encounter with regard to security of food supplies for their populations.

The attainment of those objectives referred to in Article 84 would be an important contribution to the solution of problems of food shortages in African countries. When this problem is coupled with that of uncontrolled development of major cities in Africa, where according to the World Bank estimates "one out of three Africans will be living in these vast cities in the year 2000",<sup>95</sup> the rapid and sustained development of agriculture (in Africa) becomes a matter of life and death. Thus when Lomé II particularly emphasises the need for agricultural co-operation and the development of rural areas, its agricultural provisions must be welcome by most African States. Moreover, this follows the trend already established under Lomé I, where 40 per cent of the European Development Fund (EDF) has been allocated to rural development. Under Lomé II a Technical Centre for Agricultural and Rural Co-operation is to be established (Article 88). Its main function will

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95. See THE COURIER, No.61, p.11

be to disseminate better knowledge and technology to the ACP States. Different kinds of co-operation schemes are laid down in Article 84, and it is hoped these would help to attain objectives referred to in Article 83.

African States need to co-operate with the EEC countries in order to promote both agricultural development and economic self-determination.

Title VII of the Convention is devoted to financial and technical co-operation. It contains thirteen Chapters and sixty-three Articles. This title is by far the largest in the Convention. This in itself may be an indication that financial and technical co-operation is one of the important areas of co-operation between the ACP and EEC countries. Certainly, as far as the ACP States are concerned financial aid from the EEC countries is essential because it helps them to promote their economic independence.<sup>96</sup> This point is confirmed by Article 91 of the Convention which stipulates that:

"1. The objective of financial and technical co-operation shall be to promote the economic and social development of the ACP States on the basis of the priorities laid down by those States and in the mutual interest of the parties". Under Lomé II EEC aid to ACP States amounts to 5,600 million EUA (almost U.S. \$75,000 million). This amount embraces all kinds of financing, including: grants, special loans of 40 years duration, with a ten year grace period and an interest rate of 0.45-1%, loans at reduced rates of interest and

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96. See Thirteenth General Report on the Activities of the European Communities in 1979, "Financing decisions in favour of the ACP States under the Lomé Convention at 31 December, 1979", pp.262-264; THE COURIER, No.61, "Financial and technical co-operation", p.9; THE COURIER, No.62, "Kenya and the Lomé Convention", "Relation ...../



loans on market terms. But the actual purpose of the money is to finance economic projects and programmes involving capital projects, including support costs and running costs that serve to cover the cost of operating, maintaining or managing capital projects, in particular by providing maintenance equipment or carrying out large-scale repair work.

It must be pointed out that according to Article 93 (2) of the Convention, the projects and programmes that may be financed inter alia, include:

- (a) rural development, industrialisation, craft development, energy, mining, tourism and economic and social infrastructure;
- (b) structural improvement of the productive sectors of the economy;
- (c) protection of the environment;
- (d) prospecting and exploration and exploitation of natural resources;
- (e) training, applied scientific research and applied technology, technological adaption or innovation and the transfer of technology;
- (f) industrial promotion and information;
- (g) marketing and sales promotion;
- (h) promotion of small- and medium-size national undertakings;
- (i) micro-projects for grassroots development.

The sectors and priorities for which the aid is to be earmarked are decided by individual receiving government, but the Commission may express its views on the best use of the aid, especially at the programming stage at the beginning of the period covered by the Convention, (Article 109). This means that the operations financed by the Community are implemented by the ACP States and Community in close co-operation, recognising the principle of equality between the Contracting States, (Article 108 of the Convention). However, on individual projects within

the framework of the sectors and priorities, an explicit decision of the Commission is required, and this is given after by a Committee composed of representatives of the Member States has examined the projects on a case-by-case basis.

Since it is the Committee of representatives of the Member States which decides on aid, it may be said that Community aid, is rather a means of assisting the ACP States to help themselves, and is to a large extent free from economic or political conditions than aid given under similar instruments. In this respect Community aid follows a different pattern from that given by the World Bank or the International Monetary Fund,<sup>97</sup> which in many cases impose stringent and frequently detailed economic policy requirements on developing States. Under the Convention the EEC and ACP States are equal partners, and as such, the contracting African States are responsible for their own economic destiny and must know best how they wish to develop their future. No aid development programme can take this responsibility away from them. Thus Lomé II is a contribution towards the exercise of economic self-determination by the contracting African States.

The institutional arrangement under Lomé II is established on an equal basis and on clear rejection of of any apartheid.<sup>98</sup> This policy of the Convention is

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97. See R. Richard F. Janssen, "Scheme for loans to help the supply side of members' economies: IMF tries different style of lending", in The Times, Wednesday August 6, 1980, p.20

98. See THE COURIER, No.61, "Institutions", pp.11; Thirteenth General Report on the Activities of the European Communities in 1979, "Institutions", pp.259-260.



clearly visible in its provisions describing its institutions, (Title X, Articles 163-178, and Protocols 2 and 3). Article 163 provides that the "institutions of the Convention are the Council of Ministers, the Committee of Ambassadors, and the Consultative Assembly". The idea of equality between the High Contracting Parties is manifested by the fact that the Lomé institutions are joint. This means that all the three institutions named above are composed of an equal number of representatives from the EEC members and the ACP States.

Article 164 stipulates that:

The Council of Ministers shall be composed, on one hand, of the members of the Council of the European Communities and of members of the Commission of the European Communities and, on the other hand, of a member of the Government of each of the ACP States.

It is clear from the above citation that the African States parties to the Lomé Convention have each a member of Government representing them in the Council of Ministers. This in itself ensures that the African countries directly participate in the decision making body of the Convention. Decisions of the Council of Ministers are binding on the Contracting Parties which shall take such measures as may be necessary to implement those decisions (Article 168 (3) ).

Each African State is also represented in the Committee of Ambassadors which is "composed on the one hand, of one representative of each Member State and one representative of the Commission and, on the other, of one representative of each ACP State", (Article 170).

The Committee of Ambassadors assists the Council of Ministers in the performance of its functions and carries out any mandate entrusted to it by the Council of Ministers. The Council of Ministers may also delegate to the Committee of Ambassadors any of its powers, in which event, the Committee of Ambassadors shall take its decisions in accordance with Article 167 which provides that:

1. The Council of Ministers shall act by mutual agreement between the Community on the one hand, the ACP States on the other.

2. The Community on the one hand and the ACP States on the other shall each, by means of an internal protocol, determine the procedure for arriving at their respective positions.

The Committee of Ambassadors exercises any other duties assigned to it by the Council of Ministers. It also keeps under review the functioning of the Convention and the progress towards the realisation of the objectives defined by Council of Ministers. It is the Committee of Ambassadors that supervises the work of all other bodies or working groups that may be set in accordance with the provisions of the Convention. The Committee of Ambassadors meets at least every six months, and it submits periodic reports to the Council of Ministers.

The Consultative Assembly is composed on the basis of parity of members of the European Parliament on the side of the Community and of members of parliament or representatives designated by the ACP States on the other. The Consultative Assembly which considers ways and means of strengthening co-operation between the Contracting Parties, submits to the Council of Ministers any conclusions



and makes recommendations it considers appropriate, in particular when examining the annual report of the Council of Ministers. The Assembly meets at least once a year.

### CONCLUSION

In concluding this chapter the following salient points may be drawn:

- 1) The significance of bilateral economic agreements between African States is that they provide for co-operation in specific economic sectors of the Contracting Parties. These agreements play an important role by binding the Parties to promote economic co-operation within the domain of international economic law.
- 2) Agreements between African and non-African States provide on the one hand, for the transfer of technology and capital to the African countries, and on the other hand, for the transfer of investment profits from African to the non-African States with investment operations in Contracting African States. These agreements contain some of the fundamental principles of international economic law.
- 3) Although the Treaty for East African Economic Community, together with the Community's institutional infrastructure may have provided a legal and institutional basis for an empirical study and analysis of African institutional and legal regulation of international economic co-operation between States of a given sub-region, because of the colonial background of the Treaty, the Parties to it were not successful in its implementation.

As a result, the Treaty is now defunct. A new Treaty embracing the countries of Southern and Eastern Africa is in process of being made. The new broadly based Treaty will provide for economic co-operation for two sub-regions. The significant distinction between the defunct Treaty for East African Economic Community and the proposed Southern-Eastern African Economic Treaty would be that the new Treaty is emanating from direct African initiative and commitment. The Parties to the new Treaty will have to be committed to it because they will have initially participated in its formulation.

4) The significance of the West African Economic Treaty is that it covers a wide spectrum of economic issues. It can be widely interpreted to suit the economic aspirations and objectives of the Member States. If this Treaty is to have a long term duration, the Parties must implement its provisions to the letter and spirit of the instrument. For this to happen, the Parties must have the determination to foster their economic Union and achieve economic self-determination within the framework of an integrated economic forum.

5) It has been shown that the Convention for Central African Economic and Customs Union is a better legal instrument than those of other African sub-regional economic organisations because it provides for the formulation of uniform laws, by the Member States. This allows uniform regulation of the Member States economic activities within the Union.



6) Judging from the number of specialised subsidiary institutions that in fact perform the tasks of implementing the main legal instruments of the Maghreb sub-regional economic organisation, one may say that this organisation is the most successful among the African sub-regional economic groupings. However, a certain degree of inconsistency may be observed regarding the way this organisation has been functioning since its formation.

7) Under the Agreement establishing the African Development Bank, the Bank is declared an independent development institution. This status is important for the Bank to remain free from direct or indirect influence of any Member State or States.

8) The Arab Bank for Economic Development in Africa, whose main objective is to encourage private Arab investments in certain important sectors of African economies, no doubt plays the role of promoting development of economic self-determination in Africa.

9) After attainment of political independence African States seek to secure international markets for their primary commodities and other export products. Hence they have entered into inter-regional co-operation with the EEC countries under the Lome Conventions and their predecessors.

Being among the World's main producers of primary commodities, African States are dependent on these resources for their export earnings. This dependence arises from the fact that the EEC and the West in general provide the main market for the primary products and manufactured goods from the African countries. Under Lome II, African and other ACP States benefit from the Stabex and Sysmin

systems that are designed to maintain profitable production capacity in primary commodities of those countries so as to avoid the fall in their export-earnings. In general, the provisions in Lome II are a contribution towards the promotion of the exercise of economic self-determination by African States.



## CHAPTER 4

LEGAL AND INSTITUTIONAL ASPECTS OF ECONOMICUTILISATION OF AFRICAN INTERNATIONAL RIVER BASINSSection A. General Concepts

Utilisation of African International river basins is an essential element of the exercise of economic self-determination because of the vital need to create adequate water resources development throughout the whole continent. African States are making efforts to overcome the problems caused by lack of adequate water resources development, particularly in regard to irrigation, development of hydro-potential and access to safe drinking water supplies.<sup>1</sup> However, there is a scarcity of or inadequacy<sup>2</sup> in legal regulation and control of economic utilisation of water resources development in Africa. Not only at an international level, but even at national level, comprehensive legislation is lacking in this field.

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1. The present Government in Zimbabwe is establishing agricultural irrigations projects known as "Operation Seed" which means "soldiers employed in economic development". The aim of "Operation Seed" is to engage as many Zimbabwean soldiers as possible in agricultural economic projects, especially in the irrigation development schemes, see N. Ashford, "Zimbabwe treasures fragile, hard-won state of peace", in The Times, Thursday, July 31, 1980, p.7; The Times, Wednesday, June 4, 1980, "Zimbabwe peace brings hope to Mozambique", p.8; Agricultural Bulletin for Africa No.2, January, 1963, "ECA/FAO, Summary Report on Irrigation Schemes in Africa"; Idem., No. 13, June, 1971, "Irrigation water sale in the Non-Public Sector in the Northern Province, Democratic Republic of the Sudan", p.53.
  2. See U.N. Economic Commission for Africa, Regional Report: Part Three, Report of the 37 African Countries at the United Nations Water Conference at Mar del Plata, Argentina, held from 7-18 March, 1977, p.59; U.N.E.C.A., Doc. ST/ECA/154 (Sales No. E.72.II. A. 10), Water Resources Laws and Legislation.

Apart from customary<sup>3</sup> laws which govern the use of water in different African communities, prior to attainment of political independence, many African States have often employed parts of their civil laws to regulate the use of water and water resources. The use of such laws reflected the legal principles and practice which are prevalent in the metropolitan countries. After achieving political independence, most African States have replaced or are replacing those civil laws by new legislation which provides the necessary legal framework for water resources utilisation and development.<sup>4</sup> In some countries, where there were no water laws, acts,<sup>5</sup> decrees and ordinances, administrative rules and regulations were introduced. Such administrative rules and regulations which vary from country to country depending on the national needs, contain provisions dealing with matters concerning licencing and abstracting.

Due to new and expanding economic needs, plus the necessity to co-ordinate economic development in the whole African continent, new water resources utilisation laws are being drawn up. However, it may be observed that uniformity is also growing in the

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3. Regarding African Customary Law see Journals of African Law, (published by Butterworth & Co. (Publishers) Ltd., London, 88 Kingsway, WC2B 6AB). The Journals are devoted to legislation enacted in African States. See also Portugal-U.K., Exchange of Notes concerning Portuguese participation in the Shire Valley Project, 21 January, 1953, in U.N.T.S., Vol.175, p.13.
  4. See D.A. Caponera, "Legal and institutional aspects of water resources development in Africa", in UN.FAO Legislative Branch, Background Paper No.10, June, 1976.
  5. See Journals of African Law, in relation to Acts, Decrees and Ordinances formulated by African States; U.N. Dept. of Economic and Social Affairs, Doc. (UN.II ....)



scope of the new laws. Again this is so because of the need to promote economic integration and development in the whole continent. In some countries where water laws are being modified or formulated, conceptual changes indicate a shift from stressing the "riparian rights" to emphasising the concept of "the greatest beneficial use". "Riparian rights" is one of the forms in the utilisation of international drainage basins. This is based on customary international law. But in recent years another principle "a Community of Property in Water" or "Community of interests", or "Community of coriparian states in the waters of an international river" has developed. According to this principle the basin is regarded as an economic unit, irrespective of state boundary, and the waters are either vested in the community or divided among the coriparians by agreement, (e.g. The Nile and Indus Treaties). A river that flows through the territory of several states is their common property.<sup>6</sup> "The greatest beneficial use" concern the multi-purpose uses of international drainage basins. Its application by African States means that they are emphasising the

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5. Continued .....

/99), Abstraction and use of water: Comparison of Legal Regimes, (UN., N.Y., 1972).

6. For further discussion of the concept of "a Community of Property in Waters", see F.J. Berber, Rivers in International Law, (London, 1959), pp.22-25; A.H. Garretson, R.D. Hayton and C.J. Olmstead, The Law of International Drainage Basins, (N.Y., 1967), pp.15-19; Ibid., pp.276-279; H.A. Smith, Economic Uses of International Rivers, (London, 1931); R.D. Hayton, "The Formation of the Customary Rules of International Drainage Law", in Garretson, op.cit., pp.834-895.

greatest possible use of international rivers within the framework of economic co-operation.<sup>7</sup>

It must be noted however, that many new water utilisation laws operating in African countries today, regulate questions concerning ownership rights. Many new water utilisation laws operate also in the fields of licencing and abstraction. The move to "the greatest beneficial use" concept or principle must not be regarded as a rejection of the "riparian rights" conception. African riparian States have maintained their "riparian rights" and will continue to do so, while promoting greater participation by other States and bodies in the utilisation of international river basins of the continent. Moreover, in order to achieve "the greatest beneficial use" of these resources, the African States have increased their efforts to engage the United Nations and any other outside bodies to participate in the utilisation and development of African water resources.

The United Nations Economic Commission for Africa recommended that the African countries:

- 1) Make an inventory and critical examination of rules, regulations, decrees, ordinances and legal legislative measures in the field of water resources development;

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7. Out of 54 international river and lake basins of Africa, 14 drain areas more than 100,000 Km. The river basins of the Niger, the Nile and the Zaire cover nine countries, while the Volta and Zambezi cover five and six countries respectively. The area covered by the international river basins in Africa is about half the total area of the continent, see U.N.E.C.A., Regional Report, loc.cit. n.2 above, p.7. Elaboration of "the greatest beneficial use" of international rivers in Africa is given elsewhere below in this chapter.



- ii) Evaluate the body of existing legal and legislative provisions with a view to identifying legal and legislative requirements to be fulfilled in future to facilitate water development;
- iii) Review the existing legislation in order to improve and streamline its scope to cover aspects pertaining to water development, protection of quality, prevention of pollution, penalties for undesirable effluent discharge, licencing, abstraction, ownership, etc.;
- iv) Review existing legislation with a view to evaluate the effect of water rights on public interest, the participation of users in planning, implementation and conservation and protection of quality against pollution, or under or over utilisation;
- v) Consider the early enactment of suitable legislation, where none exists at present, taking into account in the process, the drafts of water codes circulated by such inter-governmental agencies as the inter-African Committee for Hydraulic Research (CIEH), and the Mauritian Common Organisation (OCAM).<sup>8</sup>

From the above citations it is noted that African States are urged to improve the quality of water development laws, formulate new laws where none exist, respect the principle of public utility and ownership rights, and consider the question of unification or codifying of water laws which are either being revised or formulated by the States. Thus African States are being recommended to internationalise their water resources utilisation and development laws, with the aim of maximisation of utility benefits.

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8. See United Nations Water Conference, held in Mar del Plata, Argentina, 14-25 March, 1977, (E/CONF. 70/7. January 3, 1977), "Economic Commission for Africa Regional Report.", p.16.

Before entering into analysis of the relevant legal and institutional arrangements relating to the economic utilisation and use of international river basins in Africa, it is necessary to concern ourselves with some general concept<sup>9</sup> regarding the subject-matter.

It is essential to note that there are rules of international law governing the use and utilisation of international river basin resources. Those general rules are applicable to the use of waters of international drainage basins except in such cases where an international convention, agreement, or binding custom among the basin States may provide otherwise. International river law governs the manifold uses of the waters of international drainage basins. But the problems relating to the utilisation of international river resources must be approached on the basis of the individual river basin, which forms what is considered to be the integrated unit. It is also important to understand the scope of an international river basin. What is meant or understood by the term "international river"? In international law, an international drainage basin is a geographical area extending over two or more states, which is determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

Historically, the use of international rivers was almost completely for navigation.<sup>10</sup> Though up to

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9. See David G. LeMarquand, International Rivers: The Politics of Co-operation, (Vancouver, 1977).

10. See R.W. Johnson, "Freedom of navigation for international rivers: What does it mean?", in Michigan Law Review, Vol.62, 1963/5, pp.465-484; H. Fortuin, "The regime of navigable waterways of international .....



the 19th Century, other types of uses of international rivers consisted chiefly in the diversion of water by riparian states for the purpose of irrigation, domestic and municipal uses, fishing, uses of water in gold mining operations, and in the winning of sand, gravel and stone from the river bed.<sup>11</sup>

In the 19th and 20th Centuries, however, due to the rapid technological advances, new types of uses of international rivers have come into being. Of course, there has been an intensified exploitation of the water resources for the previously known uses, but today there are what have come to be known as the multi-purpose international uses of international river basins. This terminology is also applied to the multi-purpose uses of African international river basins.

The basic contemporary uses<sup>12</sup> and utilisation of international rivers is observed in the following economic fields: navigation; industrial; (which includes national and municipal industrial uses, and uses in the agricultural sector, e.g. irrigation and on other agricultural projects); generation of hydroelectric power; fishing and the floating of timber. Although the rational economic utilisation and use of international

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10. Continued .....

concern and the Statute of Barcelona", in Ned Tijdschr. Int.Recht(1960), pp.125-43; Berber, Rivers in International Law, loc.cit., n.6.

11. See George Ernest Glos. International Rivers: A Policy-Oriented Perspective, (Singapore, 1961), p.143.

12. For an outline of the multi-purpose uses of fresh water, see The Yearbook of the International Law Commission 1976, Vol.II, Part II, (UN., N.Y., 1977), p.156. Fresh water is generally used in the areas of agriculture; economic and commercial; and domestic and social. And purposes of water uses in each area, inter alia, may be outlined as follows: Agricultural uses: (a) Irrigation; (b) Drainage; (c) Waste Disposal; (d) Aquatic food production.

river-resources by African States in common with other types of economic development has as its aim, the attainment of economic independence, such utilisation and use must be recognised as a separate sector of a country's economic and social development.<sup>13</sup> This is so, because of certain specific problems that are found in this area of a country's economic development. A significant change may occur in water quantity or quality, or in the timing of the flow. For example, natural erosion or channels and reservoirs in one State may endanger downstream States,<sup>14</sup> irrigation upstream may deprive downstream States of adequate water supplies for established navigation, or all sorts of industrial projects and any other agricultural uses. Works downstream may deprive upstream States of the ability to use the rivers' waters for navigation or timber floating.

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13.     Economic and commercial uses:     Domestic and Social uses:
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|--|--|
| (a) Energy production(hydro-electric, nuclear and mechanical); | (a) Consumptive (drinking, cooking, washing, laundry, etc.); |
| (b) Manufacturing;   | (b) Waste Disposal;  |
| (c) Construction;  | (c) Recreational (swimming, sport, fishing, boating, etc.).  |
| (d) Transportation other than navigation;                      |  |
| (e) Timber floating  |  |
| (f) Waste disposal   |  |
| (g) Extractive (mining, oil, production, etc.).                |  |
14.     John G. Laylin in his review of D.G. LeMarquand's book on International Rivers: op.cit., writes that: "... it accepts as absolute the Harmon Doctrine that a state has a legal right to do as it chooses with a river flowing through its territory without regard to the harmful effects to upstream or downstream riparians. It also accepts that, in the distribution for consumptive use of limited supplies, the principle of equitable apportionment has won judicial approval", see The American Journal of International Law, Vol.72, 1978, pp.686-687.



Pollution by upstream States may make necessary expensive purification works by downstream States to avert danger to health and allow future industrial development. Any action or omission by a riparian State, which may endanger life or property of another riparian State, is considered to be an irrational use and utilisation of an international river, which consequently may lead to an international dispute between the riparian States.

To avoid all problems or mitigate, impediments and conflicts that may arise, States sharing the utilisation of an international river must work together to co-ordinate their development activities. They must establish a programme for control so as to achieve maximum mutual benefits, proper conservation and equitable economic utilisation of resources on the basis of equality and economic self-determination of all States. Through co-operation and collaboration, and the sharing of use and costs, each and every interested riparian State should contribute towards the international utilisation of an international river.

As regards the development of international river law in general, many rivers in Europe have long been declared international by the peace treaties concluded during the 19th Century. In fact some of the rivers as the Rhine, Danube, etc., were declared international rivers well before the First World War, and for them international regimes were established, much earlier. The general principle on the development of international

river law was laid down by the Vienna Congress of 1815.<sup>15</sup> In Africa, there are pre-independence European treaties and agreements,<sup>16</sup> which basically concern the delimitation of spheres of influence and determination of territorial boundaries by the former European administrative powers. However, some of these treaties and agreements were devoted to economic utilisation<sup>17</sup> of African international rivers, e.g. the July 20, 1927 convention between Belgium and Portugal contained provisions relating to economic uses of the Congo River (Article 2).

Since its establishment, the U.N. has made and still continues to make a balanced study of the various ways of economic utilisation and use of international rivers of the world. A number of U.N. organs have put a considerable effort into the development of this branch of international law. The General Assembly has adopted a considerable number of resolutions devoted to the development and codification<sup>18</sup> of international

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15. See L.A. Teclaff, The River Basin in History of Law, (The Hague, 1967); Smith, Economic Uses of International Rivers, loc.cit., above; Glos. International Rivers, op.cit. For the development of the River Commissions, see G.J. Mangone, A Short History of International Organisations, (N.Y., 1975), pp.68-73.

16. See Portugal-U.K.; Treaty defining the spheres of influence of the two countries in Africa, June 11, 1891, (Articles 11, 12 and 19), in Hertslet Treaties, Congress of Berlin, February 26, 1885, (General Articles 13, 17 and 26), pp.68-73; T.O. Elias, "The Berlin Treaty and the River Niger Commission", in A.J.I.L., Vol.57, 1963, pp.873-882.

17. See U.K. - Belgium: Agreement relating to Water rights on the Boundary between Tanganyika and Ruanda-Urundi, London, 22 November, 1934, in U.N.L. Scripts and Texts, Vol.4, Sales No. 63, p.96; L.M. Doss, The Law of Riparian Rights, Alluvion and Fishery, with lectures on the Rights of Littoral States over the Open Sea, (Calcutta, 1891).

18. See U.N. General Assembly Resolutions: 2669 (XXV) of ..../



law rules relating to the international water resources and the economic utilisation of international river waters. The Assembly has urged an early consideration of the study and codification by the International Law Commission.

At its twenty-third session in 1971, the International Law Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work. But the actual work on the subject begins with the preparation of a report by the sub-committee of the Commission which was appointed to do preparatory studies and to make recommendations. The Chairman of the sub-committee, Mr. Richard D. Kearney, who was the Special Rapporteur, indicated in his report<sup>19</sup> on the subject, that as a first step in undertaking its study of the non-navigational uses of international watercourses, the Commission had decided that the views of States be sought on a number of basic issues relating to the scope and content of the study. The report also indicated that the replies from the Member States to the Commission were very scanty. This is true, because none of the African States sent any reply in response to

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18. Continued .....

8 December, 1970; 1401 (XIV) of 21 November, 1959; 2780 (XXVI); 2926 (XXVII); 3071 (XXVIII), U.N. General Secretary Report, "Legal problems relating to utilisation and use of international rivers", Doc. A/8202; U.N. Doc. A/5405, 15 April, 1963; U.N. Sales No. 63, Vol. 4, op.cit., "Legislative Texts and Treaty Provisions concerning the Utilisation of International Rivers for purposes other than Navigation"; Yearbook of the International Law Commission Vol. II, Part II, Chapter 5, 1976, for detailed references on U.N. General Assembly resolutions regarding the necessity to develop and codify the law of the non-navigational uses of international watercourses, (U.N., N.Y., 1977), p. 153.

19. See Document A/CN.4/295. First report on the law of the non-navigational uses of international watercourses, by Mr. Richard D. Kearney, Special Rapporteur, 7 May. .... /

the Commission's questionnaire.<sup>20</sup>

However, in order to indicate the meaning to be given to "international watercourses", specific questions were asked on whether the geographical concept of an international drainage basin is an appropriate basis for a study of the legal aspects, and on one hand, whether the study may be conducted under the topic of non-navigational uses of international watercourses or on the other hand, under that of the pollution of international watercourses.<sup>21</sup> It is pointed out that a small majority of replies to the question supported the view that it would be desirable to begin the work on the basis of a less general term than that of international drainage basin.<sup>22</sup>

Judge Taslim O. Elias had in 1974 inquired whether the imposing polysyllables in the title meant much more than economic uses of international rivers.<sup>23</sup> The Commission, however, decided to study the subject under the topic "law of the non-navigational uses of international watercourses". Thus its main objectives are to reach any conclusion on the principles which should

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19. Continued .....

1976, Yearbook of the International Law Commission 1976, Vol.II, Part One, op.cit., p.184. On other works of the Commission concerning the subject see Ibid., p.147; Yearbook of the International Law Commission 1976, Vol. 1, Summary records of the twenty-eighth session of 3 May-23 July, 1976, "The Law of the non-navigational uses of international watercourses (A/CN.4/295 and Add. 1, A/CN.4/L.241) (Item 6 of the Agenda)", p.268, (UN., N.Y., 1977); Yearbook of the International Law Commission 1976, Vol.II, Part Two, Chapter V, p.153, op.cit.

20. See Document A/CN.4/294 and Add.1., "Replies of Governments to the Commission's Questionnaire", in Vol.II, Part One, p.147, op.cit.

21. Ibid., p.184.

22. Ibid., p.184.

23. Ibid., p.184.



govern the uses of international watercourses.

The work of the Commission therefore is to determine what rules of international law are to be applicable to the non-navigational uses of international watercourses. This being the case the Commission's task as pointed out by its members, would be to determine those general principles, and establish them by codification. The formulation of detailed international rules valid for individual international drainage basins would be the task for riparian states. This means that the particular legal regimes applicable to individual international watercourses is determined by the riparian states concerned.

Mr. Ramangasoavina, a member of the International Law Commission, expressing the position of African States regarding the economic uses of international river basins, said that:

African countries had no sources of energy apart from their hydro-electric power potential. Furthermore, they could intensify their utilisation of water, not only for agricultural purposes, but also in order to improve the quality of family life, for example through fish-breeding, which would provide new sources of food. The use of the waters of rivers such as the Nile, the Congo, the Senegal and the Niger was so important for the existence of the riparian States that they had held consultations with a view to drawing up regulations ..... As Mr. Ashakov (one of the Commission members) had pointed out, the uses of water often has a regional aspect and should be regulated at the regional level, but taking certain general principles of international law into account.<sup>24</sup>

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24.. See Yearbook of the International Law Commission 1976 Vol.I, p.274; P.K. Menon, "Water Resources: Development of International Rivers, with special reference to the Developing World", in The International Lawyer, Vol.9, No.3-4, 1975, pp.441-464.

These remarks by an African member of the Commission relate to two aspects which are connected with the economic utilisation of African international river basins. The first aspect concerns the multi-purpose uses of international rivers, the second relates to legal regulation.

The United Nations has also organised conferences concerning the use and utilisation of international river resources. One such conference was held in March of 1977, in Mar del Plata, in the Republic of Argentina. In its report the conference emphasised the point that the United Nations realises that the accelerated development and orderly administration of water resources constitute a key factor in efforts to improve the economic and social conditions of mankind, especially in the developing countries. It "urges strongly that the recommendations of this conference be effectively implemented in good faith by all States".<sup>25</sup> Thus States are here being urged to adhere to the principle of international law which requires that States observe and implement their obligations in good faith and in accordance with international law.

In general the conference adopted recommendations on such matters as the assessment of water resources; community water supply; agricultural water use; research and development of industrial technologies; the role of water in combating desertification; technical co-operation among developing countries in the water sector;

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25. See Report of the United Nations Water Conference, Mar del Plata, 14-25 March, 1977. (U.N. Document E/CONF.70/29), p.3. op.cit.

26. See W.L. Griffin, "The use of waters of international drainage basins under customary international law", in A.J.I.L., Vol.53, 1959, pp.50-80.



river commissions; industrial arrangements for international co-operation in the water sector; financing arrangements for international co-operation in the water sector; and water policies in the occupied territories.

But in particular, the Mar del Plata Conference adopted specific regional recommendations concerning the economic use and utilisation of international water resources. With regard to the African region, the conference noted that there existed and still exists an inadequacy in the institutional arrangements to effect development of water resources. It also pointed out that the problem of creating an adequate institutional infrastructure should be kept under constant review at national, sub-regional and regional levels. The U.N. Recommendations are discussed elsewhere below.

A quite extensive general discussion of the law of international river basins has been conducted by the International Law Association. Though this is a non-governmental organisation credit must be accorded to it because up to the time of writing, it is the only body which has formulated a coherent system of rules of international river law. As shown above, the United Nations has just started to formulate legal norms in this area. In 1966, after more than a decade of concerted effort by a Committee of its legal experts, the International Law Association (I.L.A.) adopted what has come to be known as the "Helsinki Rules"<sup>27</sup> concerning the uses of international

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27. See International Law Association Report, Fifty-Second Conference held in Helsinki, August 14-20, 1966, (Printed in Great Britain 1967), pp.477-533, "Helsinki Rules".

river basins. Although the Helsinki Rules are only a legal opinion and recommendations by a group of distinguished international lawyers, they constitute a basis for progressive study and formulation of international legal rules by the United Nations or by individual states.<sup>28</sup> Thus, the Helsinki Rules have no legal binding force. But the analysis of some of the Helsinki Rules in this work, will help us to understand certain points and terminologies relevant to development of international river law in Africa.

For instance, according to the Helsinki Rules, the term "riparian state" is replaced by a more comprehensive term "a basin state". When the International Law Association discovered that the traditional use of such terms as "riparian"; "Co-riparian"; "upper riparian"; and "lower riparian" used to describe "that part of a state territory which touches a river flowing on the surface of the drainage basin" was inaccurate, it adopted a more comprehensive definition. It was thought that since some underground water may flow from one state into an international drainage basin, without reaching the surface, thus contributing substantially to the surface flow, the term "basin state" must be used to describe the relationship of a state the territory of which includes a portion of an international drainage basin. This definition includes all states whose territories contribute water into an international drainage

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28. See W. Kenworth, "Joint development of international rivers", in A.J.I.L., Vol. 54, 1960, pp. 592-602; F.B. Berber, Rivers in International Law, loc. cit. above.



basin, whether or not such states are riparians. In the context of international co-operation, the term "basin state" has a wider meaning than the traditional term "riparian state". However, the use of the term "basin state" does not mean that the term "riparian state" has fallen into disuse, because a riparian state is presently regarded as one that shares the river bank at some point. Thus while a riparian state shares the bank of an international river at some point, a basin state has a portion of its territory forming part of an international river basin. An international river basin must of course run across two or more countries in the course of its flow.

The Helsinki Rules also provide a legal definition of the rights and obligations of basin states interested in entering into an international agreement with other states for the purpose of promoting an integrated economic development of that particular international river basin.<sup>29</sup> The Rules clearly define the principle of equitable utilisation of the waters of an international river basin, indicating the rights and obligations of basin states. According to Article IV of the Helsinki Rules, "each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin".<sup>30</sup>

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29. See for example Egypt-Sudan Agreement on full utilisation of the Nile Waters, in U.N.T.S., Vol.453, p.157; A.M. Hirsch, "Utilisation of International rivers in the Middle East", in A.J.I.L., Vol.50, 1956, pp.81-100.
30. See Egypt-Sudan Agreement on full utilisation of the Nile Waters, op.cit., Articles concerning the equitable use of the Nile waters by the parties.

In the light of the Article, no state may claim exclusive sovereignty over the uses of an international river basin. For a state to claim or declare exclusive sovereignty over such a basin would amount to the deprivation of the rights of other basin states.

Exclusive exercise of sovereignty in this area can result in the erosion of the right of other basin states to a continued flow of waters from an international river. This can come about when a basin state takes action which reduces or cuts the flow of water into those portions of an international river basin running through other basin states.

Article V of the Helsinki Rules defines the meaning of "reasonable and equitable" sharing of international river resources by all interested states. It is stated in Article V (1) that what constitutes a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all relevant factors in each particular case. Included in the relevant factors which may be considered are:

- (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
- (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
- (c) the climate affecting the basin;
- (d) the past utilisation of the waters of the basin, including in particular existing utilisation;
- (e) the economic and social needs of each basin State;



- (f) the population dependent on the waters of the basin in each basin State;
- (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- (h) the availability of other resources;
- (i) the avoidance of unnecessary waste in the utilisation of waters of the basin;
- (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
- (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

What is important to note is that all interested basin states participating in the economic development and utilisation of an international river basin, should compare all the factors together and determine which factors define a reasonable and equitable share in the utilisation of international river resources.

In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.<sup>31</sup> While all States have "equal rights" to utilise economically an international drainage basin, "all the relevant factors" contributing to the shared beneficial use must be considered in accordance with the rules of general international law.<sup>32</sup>

A basin State must adhere to any reasonable use or category of uses by other States, and it may not be entitled to any inherent preference over any other use

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31. See International Law Association Report of 1966, p.488.

32. See Garretson, The Law of International Drainage Basins, loc.cit., n.6 above; H.R.V. Kiilz, "Further water disputes between India and Pakistan", in International & Comparative Law Quarterly, Vol.18, 1969, pp.713-738.

or category of uses. This means that if a co-basin State A. would prefer to choose a number of uses, it may not deprive State B. the right to employ any other use or category of uses. According to Article VII,<sup>33</sup> "A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters." This Article while giving the right to the basin State to use the waters, prohibits selfish uses by means of reserving utilisation of an international basin for future purposes when some co-riparian States would thus be denied the use of the same in other areas presently open to them.

It is an obligation of the basin and co-basin States to avoid pollution of an international river basin and to that effect Article X(3) stipulates:

1. Consistent with the principle of equitable utilisation of the waters of an international drainage basin, a State
  - (a) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State;
  - (b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin States.<sup>34</sup>

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33. See International Law Association Report, 1966, Article VII, p.493.

34. See Ibid., Article X, p.498.



The salient points emerging from the above discussion are as follows:

- 1) There is inadequacy in legal regulation of water resources development in Africa. This lack of legal control is to be found both at national and international levels. However, most African States are formulating new laws or modifying the existing ones wherever possible. At the international level, the United Nations is making every effort to encourage the creation of international legal regimes to regulate the development of international drainage basins in Africa.
- 2) The "riparian rights" concept is now giving way to the concept of "the greatest beneficial use" of international drainage basin resources. This shift from the "riparian rights" concept shows a growing interest by the African States to engage in the greatest possible use of international rivers within the framework of African economic co-operation.
- 3) International river law governs the manifold uses of waters of international drainage basins. However, the problems relating to the use of resources development must be tackled on an integrated unit basis, as this would enable the riparian States to make joint efforts in the development of that particular river basin.
- 4) Although there are now many uses of international drainage basins, historically, the use of international rivers was almost completely for navigation.
- 5) It suffices to say that the "Helsinki Rules" are

serving as model rules in the development of the law of international drainage basins, although these are not binding on States.

Section B. Substantive regulation of economic uses and utilisation of African international rivers.

The primary objective in this section is to examine and analyse the basic international legal regulations governing the use and utilisation of African international river basins.<sup>35</sup> One reason for studying this topic is that utilisation and use of water resources, like that of any other natural resources, plays a vital role in the overall development of a country's economy. Africa has some of the biggest international rivers in the world and yet full economic use of those rivers is very largely as yet unattained. Present utilisation is still lacking in efficiency. The other reason is that the African States exercise their economic sovereignty in this area. It must be pointed out that any beneficial economic utilisation of African international river basins can be successfully achieved only when those States co-operate with each other and with others who may be interested, or who are willing to give assistance to promote the exercise of African States economic sovereignty.

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35. See Caponera, "Legal and institutional aspects of water resources development in Africa", op.cit.; Kenworth, "Joint development of international rivers", op.cit.; Griffin, "The use of waters of international drainage basins under customary international law", op.cit.; Garretson, The Law of International Drainage Basins, loc.cit.



However, African States meet with a considerable variety of complex problems in the process of utilising their international river basins. The problems confronted by African States and indeed by other developing regions, range from data exchange to the establishment, operation and maintenance of desirable multi-purpose projects. Many African governments wanting to start the development of an international river, are uncertain as to how to proceed due to inexperience in the selection of legal provisions and international institutional arrangements necessary to meet their particular requirements and circumstances. Moreover, the legal and institutional framework needed depends partly upon the physical characteristics and development potentiality of a particular river basin or region, as well as on other socio-economic needs of the States interested in developing the river basin for the purpose of achieving integrated economic benefits.

Despite the difficulties and problems African States meet in providing an international legal and institutional framework for the utilisation of international river basins, they establish new international legal norms and institutions, within which framework utilisation and uses are conducted.

It has already been pointed out that African international legal instruments concerning the use and exploitation of water resources, both in content and essence, do contain provisions designed to promote the economic independence of these young states. This point is confirmed by a provision included in the Act

Regarding Navigation and Economic Co-operation between the States of the Niger Basin. The provisions state that:

Considering their attainment of independence and the need for regulating by new agreement the question of the utilisation of the River Niger, its tributaries and sub-tributaries of which they are riparian States;<sup>36</sup>

the parties are:

Desirous of developing close co-operation for the judicious exploitation of the resources of the River Niger basin as well as to guarantee the freedom of navigation on the River, its tributaries and sub-tributaries and to ensure equality of treatment to those who use it.<sup>37</sup>

The African States in order to affirm and consolidate their independence, sought the abrogation and replacement by new agreements, of the colonial<sup>38</sup> legal arrangements concerning use and utilisation of African international river basins. This idea and practice favouring replacement of the old outdated colonial agreements regarding the utilisation and use of African international rivers is confirmed by the conclusion of the River Nile Agreement,<sup>39</sup> the Niger Act and the like. Egypt and Sudan noted in the preamble of the 1959 River Nile Agreement that the Nile waters Agreement concluded

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36. See Act Regarding Navigation and Economic Co-operation between the States of the Niger Basin, Niamey, 26 October 1963, in U.N.T.S.. Vol.587, 1967, p.11; African Research Bulletin EC/FIN/Techn-Series, Vol.14, 1970, "Senegal River States (OERE) River Navigation Plan", p.1696; Fortuin, "The regime of navigable waterways of international concern and the Statute of Barcelona", op.cit.
37. See Ibid., p.11; Johnson, "Freedom of navigation for international rivers: What does it mean?", op.cit.
38. See U.K.-Portugal: Exchange of Notes providing for Portuguese participation in the Shire Valley Project, op.cit., p.13.
39. See Egypt-Sudan: Agreement concerning full utilisation of Nile Waters, op.cit.



in 1929 provided only for the partial use of the Nile waters and did not extend to include a complete control of the River waters, to suit the interests of the two contracting parties. To emphasise the point that African States are formulating new laws or providing new legal regimes to replace the old colonial ones, the Niger Navigation Act provides in Article 1, that:

The General Act of Berlin of 26th February, 1895, the General Act and Declaration of Brussels of 2nd July, 1890, and the Convention of Saint-Germain-Laye of 10th September, 1919 are and remain abrogated as far as they concern the River Niger, its tributaries and sub-tributaries.

Regarding the rights and obligations of States, African Agreements are broadly similar. They provide for co-operation between States whose territories or part of them are situated within a single international drainage basin. They also provide for co-operation, firstly by formulating the basic general and specific principles upon which co-operation is to be founded, and secondly, by establishing substantial joint and continuing international institutional arrangements. This proposition may be illustrated by Article 2(1) of the 1963 River Niger Act which provides as follows:

The utilisation of the River Niger, its tributaries and sub-tributaries, is open to each riparian State in respect of the portion of the River Niger basin lying in its territory and without prejudice to its sovereign rights in accordance with the principles defined in the present Act and in the manner that may be set forth in subsequent special agreements.

The First Article of the River Nile Agreement talks of what is defined as "Acquired Rights". It stipulates in

part (1) that the amount of the Nile waters used by Egypt until that Agreement was signed, constitutes her acquired rights before obtaining the benefits of the Nile Control Projects and those projects which will increase their yield and which projects are referred to in the Agreement. The total of the acquired rights are stated as 48 Billiards of cubic meters as measured at Aswan. Part (2) of the same Article defines the acquired rights of the Sudan providing:

That amount of waters used at present by the Republic of Sudan shall be her acquired right before obtaining the benefits of the projects referred to above. The total amount of this acquired right is 4 Billiards of cubic meters per year as measured at Aswan.

The spheres of utilisation and use of the international rivers in Africa is as generally defined or described in the Agreements. In the case of the River Niger Act, Articles 2 (2) and 3 specifically describe aspects of utility. Article 2 (2) states that "the utilisation of the said River, its tributaries and sub-tributaries shall be taken in a wide sense, to refer in particular to navigation, agricultural and industrial uses, and collection of the products of its fauna and flora." Article 3, while providing the basin States with the right to free navigation for their merchant vessels, pleasure craft, and for the transportation of goods and passengers, also gives freedom of navigation to the ships and boats of all nations which are in all respect treated on the basis of complete equality. Here we observe the recognition and exercise of the



principles of sovereign equality and self-determination on one hand, and granting of the freedom of navigation in the State territorial waters to the ships of third part States, on the other hand.

An interesting standpoint has been observed, namely: the attitude of Sudan and Egypt as regards the rights of other riparian States outside the framework of the Nile Agreement. Article 5 describing the "General Provision", provides that if it becomes necessary for the parties to negotiate with any other riparian State that claims a share in the utilisation and use of Nile waters,<sup>40</sup> the two parties shall negotiate as one through their Technical Commission. This would allow them jointly to consider and reach a unified view regarding the said claims, and if the said consideration results in the acceptance of allotting an amount of the Nile water to any of the riparian States, the accepted amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan. Such provision gives the right to other riparian States to claim access to the utilisation of the Nile waters but it does not seem to grant those same riparian States the right to use the Nile waters without first requesting Sudan and Egypt to allot them the use of an amount of the Nile waters from their already decided and allocated acquired rights. This problem of

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40. See Egypt-U.K.: Agreement concerning Construction of the Owen Falls Dam, Uganda, 30 May - 5 December, 1949, in U.N.T.S., Vol.226,p.273; F.A.O. Legislation, Vol. XVIII, Nos. 1 and 2, "Kenya: The Fish Industry Act, No.24, of 27 April, 1968".

allotting waters of an international river was in fact experienced when during the negotiations for the 1959 Nile Agreement, the Sudan had to negotiate for allotment from the "acquired rights" of Egypt regarding its previous use of the waters. This resulted in the Sudan being allotted the amount of water presently in the use of Sudan. As is shown in the Nile Agreement the amount of water allocated for use by Egypt is far greater than that allotted for Sudan. Thanks to the compromise reached during those negotiations, the Sudan agreed to accept the amount of water it now controls. The inclusion of such provisions as in Article 5 of the Sudanese-Egyptian Nile Agreement, may be interpreted as seeking the "legitimate" monopolisation of the use of the waters of an international drainage basin such as the Nile River. This appears to be incompatible with the international law principle that requires an equitable utilisation of the waters of an international drainage basin, because in accordance with that principle, each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

One of the areas where legal regulation is needed is when riparians or basin States co-operate to establish joint studies and execution of joint projects likely to have an appreciable effect on certain features of the regime of the river. Here a multilateral agreement is considered to be the best legal arrangement because



it provides a wider framework for economic co-operation. Thus in the field of inter-governmental projects study and establishment of economic programmes, bilateral agreements do not suffice for the formulation of a comprehensive international programme of action conducive to the beneficial and economic development of African international river basins. For instance, the 1959 Nile Agreement stops short of providing a wider framework of economic co-operation regarding utilisation of that river. While bilateral economic agreements do provide for co-operation between two parties, they do not embrace the regulation of activities of all the basin States which may be interested in development of a particular international river basin. This being the case, the entrenchment in the Nile Agreement of a provision calling on other basin States wishing to establish economic projects on the river, to negotiate with Egypt and Sudan jointly, is not justified. It means that if Uganda, being a basin State, wished to establish any project on the Nile River, it should first negotiate with those two countries, as if they had sovereignty over the whole river.<sup>41</sup> If on the other hand, all the Nile riparian States had concluded a multilateral treaty on the use and utilisation of the waters of the Nile River, they would have avoided the

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41. See LeMarquand, International Rivers: op.cit. He writes that the Harmon Doctrine that a State has a legal right to do as it chooses with a river flowing through its territory without regards to other riparians is giving way to the principle of greater co-operation between riparians.

necessity for other riparians to enter into negotiations and conclude agreements, should they desire to construct works or projects on the river as provided by Article 4 of the Nile Agreement, which provides that:

The drawing up of the working arrangements for any work to be constructed on the Nile, within the boundaries of the Sudan, and also those to be constructed outside the boundaries of the Sudan, (shall be done) by agreement with the authorities concerned in the countries in which such works are constructed.<sup>42</sup>

What this provision implies is that other riparians are required to consult Egypt and Sudan, before they may establish any projects on the Nile River.<sup>43</sup>

In contrast, a multilateral agreement provides for a legal regulation that embraces all riparians. Article 4 of the Niger River Act provides as an example:

The riparian States undertake to establish close co-operation with regard to the study and execution of any project likely to have an appreciable effect on certain features of the regime of the River, its tributaries and sub-tributaries, their conditions of navigability, agricultural and industrial exploitation, the sanitary conditions of their waters, and the biological characteristics of their fauna and flora.<sup>44</sup>

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42. See Egypt-Sudan: Nile Agreement, Article 4.

43. See The Times Saturday June 3, 1978, "Ethiopia attacks Egypt over Blue Nile threat", p.3. This Article confirms the point of the inadequacy of the Nile Agreement regime to provide a wider framework of economic co-operation that would include the participation of other riparians. It reads: "The Ethiopian Foreign Ministry has attacked President Anwar Sadat of Egypt for suggesting that Egypt would go to war if Ethiopia interfered with the flow of water down the Blue Nile." The Egyptian leader had understood that although Ethiopia had no immediate plans for any new developments on the Blue Nile, it had completed a survey to build a dam some years ago. Contesting this challenge from Egypt, Ethiopia pointed out that "in addition to its international character, the Blue Nile is one of Ethiopia's own natural resources", p.6.

44. See The Niger River Act, Article 4, op.cit.



A comprehensive agreement involving all riparians reduces the likelihood of legal constraints or conflicts amongst the States concerned. Thus, since the parties will have entered into a multilateral arrangement, any joint project or activities undertaken by such parties must be regarded as having been entered into freely and therefore, will be an objective reflection of free expression of their will. Moreover, a multilateral agreement provides for the encouragement and promotion of a joint economic development of the whole international river basin, which should benefit all riparians.

It is observed that there are two basic forms employed to regulate the utilisation and exploitation of African international river resources. One form is bilateral regulation, the other is multilateral. But of the two regulatory forms the most economic to use is the multilateral. This is due to its wider spectrum regarding its operation, and because it provides for multilateral agreements for the utilisation of African international river basins.

It follows therefore that, to facilitate regulation of the relationship between all riparians, the legal regimes of an international drainage basin have to be as broad as possible. The design of such a legal regime and institutional structure responsive to the special circumstances of all riparians in a particular basin or system would establish or improve the relationship between riparians. An attempt has already been made to establish a broad-scope collaboration

by riparians or basin States of the Senegal River.

In the Senegal River Agreement of 1968, there are provisions which in a broad sense govern the relationship between all parties. They cover such aspects of international regional development as trade and industrial planning. Other such broad-scope collaboration agreements are: the six major agreements concerning the development of the Lake Chad Basin;<sup>45</sup> the River Niger Basin;<sup>46</sup> and the Senegal River Basin<sup>47</sup> agreements. It is important to note that an agreement in principle does not contain the subsequent legal and institutional design. Rather it should set the stage for thoughtful elaboration of the framework of co-operation, at the technical level as well as at other specific areas covering the country's involvement in the development of the given international drainage basin or system.

One of the most interesting topics related to the development of international river drainages is the question of the legal status of projects constructed on those international rivers.

There are two categories of projects that may be constructed on an international drainage basin, namely:

(a) Projects that have national legal status. Thus constructed at national level.

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45. See Official Gazette of the Federal Republic of Cameroon 4th year, No.18, (15th September, 1954); Revue Juridique et Politique Indépendance et Co-operation, 19eme année No.2, X (Avril-Juin, 1965) pp.306-309.

46. See Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad: Agreement concerning the Niger Basin Commission and the Navigation and Transport on the River Niger, 25 November, 1964, in U.N.T.S., Vol.587, p.19; Niger River Act, p.9, op.cit.

47. See Journal Officiel de la République du Senegal, ...../



(b) Projects with an international legal status. These are created at international level and are constructed by joint efforts of governments interested in the utilisation of an international river. Normally, a project of an international legal status is created within the framework of a functioning international agreement, or in the absence of such an agreement, simply by co-operation between States. It must be stressed here that the co-operation is at State level and would constitute an international project with international legal status as stated above.

On the other hand a national project is created or constructed by purely national efforts. A national project is a national property of the State irrespective of whether the money that financed it came from abroad or originated at home. More importantly, a national project will always be regulated by the use of national laws of the country. Thus national jurisdiction is always applied to national projects. In the case of a change of State sovereignty, a national project, under the law of succession, becomes the property of the new State. Thus such property is then governed by the law of that new sovereign State. In his Article entitled, "International legal aspect of the Kariba Project",<sup>48</sup> R. H. F. Austin suggests that the Kariba

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47. Continued .....

20 February, 1965, Senegal River Basin Agreement, of 26 July, 1963, p.171; Senegal, Guinea-Mali-Mauri in U.N.T.S., Vol.627, p.251.

48. See Neville Rubin & William M. Warren, Dams in Africa: An Inter-disciplinary Study of Man-made Lakes in Africa, (London, 1968), pp.148-149; Northern Rhodesia-Southern Rhodesia: Agreement relating to the Central African Power Corporation, 25 November, 1963, in Northern Rhodesia Government Notice No.2333 of 1963; T. Land, ...../

Project has acquired an international legal status. He does so by elevating the legal capacity of a national corporation (Federal Power Board) to the level of a State. But the capacity of the Federal Power Board was that of an agency of a State.

The Federal Power Board was a corporation serving the power interests of the Federation of Rhodesia and Nyasaland. The Board concluded a loan agreement with the World Bank in order to finance the establishment of the Kariba Project.<sup>49</sup> The British Government which was the administrative authority of the Federation since the three Federal territories were British dependencies, stood as a guarantor to the loan agreement. It is a requirement of the World Bank that a State should stand as a guarantor when its corporations enter into business ventures of the Kariba Project nature. The rule is that when loans are granted to an agency of the borrowing State, that State provides guarantee for that loan. In support of his view, Austin goes on

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48. Continued .....

"Dams in Central Africa: £35m. for Kariba Water", in African Development, Vol.2, October, 1969, p.24.

49. The Kariba Project was constructed in 1956, after the International Bank for Reconstruction and Development had made a loan to the then British administered territories of Southern Rhodesia, Northern Rhodesia and Nyasaland. The agreement of the loan was signed between the World Bank and the Federal Power Corporation. The loan was made to finance a programme for the production of power by the installation of a hydro-electric plant, having a maximum capacity of 1,200,000 K.W. in the Kariba Gorge of the Zambezi River; World Bank-Central African Power Corporation-U.K.: Loan Assumption Agreement, Kariba Project, 30 December, 1963, in U.N.T.S., Vol.551, p.74; Ibid., Bank-Southern Rhodesia-U.K.: Guarantee Agreement, Kariba Project, p.105; Ibid., Bank-Northern Rhodesia-U.K.: Guarantee Agreement, Kariba Project, 30 December, 1963, p.119.



to write that:

International law and international rivers - the sources of international law rules in this sphere, as in all other spheres of international law, are exclusively those set up in Article 38 of the Statute of the International Court of Justice, namely: international customary law, international convention and general principles of law recognised by civilised nations. The governing principle most relevant to the problems involved in the exploitation of waters common to two or more States is sovereignty, against the background of which States may agree to limitations of their exclusive control, in favour of co-operation.<sup>50</sup>

In my opinion, while the Federal Power Board might have had the capacity to conclude an international agreement, in essence, when it entered into agreement with World Bank, it was merely acting as an agent of the British State. Since the three countries that constituted the Federation of Rhodesia and Nyasaland were not sovereign States, it cannot be suggested to be even an implication, that the Kariba Project was an international project. Thus the Kariba Project was only conducted by one State - the United Kingdom. Only the U.K. exercised sovereignty over the Kariba Project, not the dependent territories in the Federation. The position, that the United Kingdom was the sovereign authority in the Federation was maintained by the United Nations up to the time when Northern Rhodesia (now Zambia) and Nyasaland (now Malawi) attained political independence.

Austin's analysis and discussion of the Kariba Project seem to reveal an element of contradiction and

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50. See Neville Rubin, Dams in Africa, op.cit., p.151; Royal Institute of International Affairs, Documents on International Affairs, Series A - International Rivers.

misinterpretation of international law. He writes:

On the other hand it must be noted that the international agreement (meaning the agreement between the Bank and Corporation) has not been registered with the United Nations, which would be consistent with the non-sovereign status of the parties.<sup>51</sup>

The contradiction revealed is that on one hand, Austin attributes an international legal aspect to the Kariba Project, while on the other hand, stating that the parties to the agreement did not possess sovereign status. When in 1963, the U.K. dissolved the Federation of Rhodesia and Nyasaland, it then created a separate Corporation which later signed an agreement with the World Bank. This new corporation which apparently took over the duties of the Federal Power Corporation, confirms the point that the Kariba Project was a national property of the U.K. Moreover, under an agreement between the U.K. and the World Bank, the Kariba Project international accountability and sovereign authority over Rhodesia is a responsibility of the United Kingdom governments. According to Christopher Parker: "in the next plan Zambia will probably stop depending on Rhodesia's Kariba Dam for power."<sup>52</sup> This again confirms our point that the Kariba Project is a legal property of the British Government because Rhodesia is in law a U.K. dependent territory.

On the question of projects constructed by two or more sovereign States, that have signed an international

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51. See Neville Rubin, Dams in Africa, loc.cit., p.151.

52. See African Development: October 1971 "Zambia Economic Survey" (suppl.) Z., p.29, (London, 1971); O. Orebody, "Wealth of Cabora Bassa", in African Development, November, 1969; J. Spiner, "Cabora Bassa-Dam", in African Development, Vol.2, 1968, pp.26-29; African Development, July, 1970, Special Supplement, "United Arab Republic: Aswan Tomorrow".



agreement, there are no problems regarding the legal status of such projects. They are either a property of the States jointly or separately, depending on whether they are financed jointly or separately. But the question of State jurisdiction over such projects is still defined by the treaty or agreement. The Nile Agreement provides special provision for the establishment of specific projects. Under Article 3 entitled "Projects for utilisation of Lost Waters in the Nile Basin", Egypt and Sudan may:

Construct projects for the increase of the river yield by preventing losses of waters of the Nile Basin in the swamps of Bahr el Jebel, Bahr el Zeraf, Bahr el Ghazel and its tributaries, the Sober River and its tributaries and the White Nile Basin. The net yield of these projects shall be divided equally between the two Republics and each of them shall contribute equally to the cost.<sup>53</sup>

It is further stated that the Republic of Sudan shall finance the above-mentioned projects out of its own funds. The United Arab Republic then shares the costs in the ratio 1:1 the same amount as is allocated to her in the yield of such projects.

It is quite apparent here that the two countries have equal rights and bear equal responsibilities.

Section C. U.N. Recommendations and E.C.A. Resolutions encouraging the strengthening and establishment of international river institutions in Africa

The institutional inadequacy regarding the economic utilisation of African rivers is known to the African States as well as to the United Nations.<sup>54</sup> The Mar del Plata

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53. See The Nile Agreement, in U.N.T.S., Vol.453, 1968, loc.cit., p.68.

54. See Report of the United Nations Water Conference, Mar del Plata, 1977, Doc.(E/CONF.70/29), (UN., N.Y., 1977);...

United Nations Water Conference adopted inter alia

three types of resolutions concerning this subject:

1. Resolutions concerning institutional arrangements for international co-operation in the water sector;
2. Resolutions concerning River Commissions; and
3. Resolutions concerning Financing Arrangements for the international co-operation in the water sector.

The Conference also recommended closer co-operation among the Developing Countries, especially that the African countries should strengthen the existing institutions or establish new ones where necessary. Inter-Governmental agencies; the U.N. Economic and Social Council; U.N. Committee on Natural Resources; and E.C.A. were recommended within their respective competences to play a central role in promoting economic utilisation of African international river basins.

The Economic Commission for Africa was given a special role to play in establishing, or strengthening the existing, inter-governmental river commissions in Africa.

The following were the Conference's general recommendations to all U.N. Economic Commissions, including E.C.A.:

- i) Assist the United Nations Development Programme and the United Nations specialised agencies and organisations, at the request of the governments of the developing countries concerned, in identifying inter-sectoral sub-regional, regional and inter-regional projects and preparing programmes;

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54. Continued .....

U.N.E.C.A., Regional Report, Doc.E/CONF.70/7; Consolidated Action Recommendations, E/CONF.70/7, Note by the U.N. Secretary General at the Mar del Plata Water Conference; Report of the 37 African Countries at the Mar del Plata Conference, op.cit.; Inter-Governmental Panel of Specialists on the U.N. Water Conference, Report: Doc.E/C.7/3, Sales No.E.72.II. F.20, (UN., N.Y., 1972).



- ii) Intensify their efforts in the water sector, and with the assistance of the competent organisations of the United Nations system and the request of the Governments concerned, enlarge co-operation among the countries in the water field at the sub-regional, regional and international levels;
- iii) Assign specific responsibility on water to an existing international committee within the regional commission, or if necessary, create a new one, and establish or strengthen, as appropriate, the secretarial units of the commission dealing with water, which would serve as the secretariat of the inter-governmental committee referred to in this subparagraph;
- iv) Establish ad hoc groups of experts, as and when necessary, who would preferably be drawn from countries of the region concerned.<sup>55</sup>

From the above recommendations it is clear that the Economic Commission for Africa, U.N.D.P.; and other U.N. Agencies, at the request of the African States concerned, may assist in identifying and establishing projects, and in preparing proposed economic programmes. These U.N. organisations were also asked to aid intensification of co-operation among the African countries engaged in or those establishing new avenues of co-operation in the field of water development. The E.C.A. may assign any specific duty to an international committee existing in the area, to deal with water matters, or it may create or strengthen a unit or units of its own secretariat to serve as secretariat to the inter-governmental committee dealing with the development of international drainage

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55. See Report of the U.N. ,Mar del Plata Water Conference 1977, loc.cit. above; Ibid., U.N.E.C.A. Report, loc. cit., above. This Report included inter alia, discussion on such matters as National water policy; Institutional arrangements; Legislation; Education and Training; Regional Co-operation and International Co-operation, etc.

basins. As it is necessary that the African expertise (if any) should be employed in the development and exploitation of all types of African natural resources, the Commission was recommended to establish provisional groups of African experts who would deal with the problems when they arise.

In order to meet the requirements for creation of an adequate institutional infrastructure the United Nations Water Conference put forward six recommendations specifically devoted to the development and utilisation of African international river resources. Since these Mar del Plata specific resolutions regarding the uses and development of African international river basins are considered to be the basic international regulation on the issue, it is essential for them all to be analysed in this sub-section. It was recommended that the African States should:

- (a) Consider strengthening existing sub-regional organisations according to their individual needs, in consultation with the organisations concerned;
- (b) Consider the creation of regional teams of experts/consultants under either the Economic Commission for Africa or any other suitable African development agency; such teams should carry out similar tasks in adjacent African countries for groundwater assessment, studies on water demand, reconnaissance of sites, etc., so as to enable the countries to work together over an extended period of time under similar technical conditions;
- (c) Encourage the formation of technical associations open to all who possess the necessary professional credentials to be organised regionally with annual all-African conferences focussing on specific problem areas and solutions;
- (d) Consider the establishment of specific institutes within the common river basins to promote scientific studies, to formulate



basin-wide plans for integrated basin development and to promote manpower training and an institutional framework within the basin States so as to reduce progressively the dependence on foreign consultancy enterprises;

- (e) Consider expanding the scope of various specifically African agencies; such as the Organisation for African Unity or Economic Commission for Africa, so as to encourage participation in water resources development programmes to a much greater extent than hitherto; such regional organisations are potentially the most effective for co-ordination at the regional level, and for the evaluation of the progress of projects and their implementation at specific intervals of time - such as every three to five years;
- (f) Strengthen the Secretariat of the Economic Commission for Africa in its water resources activities so as to assist in co-ordinating the activities of the United Nations bodies at the regional level and to follow up the recommendations for Africa in the field of water resources.<sup>56</sup>

The above recommendations call on African governments to employ every possible means available to establish and maintain closer co-ordinated collaboration and co-operation so as to consolidate maintenance of old institutions or create new ones to deal with the problems of development and utilisation of international rivers and lakes in the whole African continent.

Reiterating the position of U.N. and stressing the general recognition of the international law principle

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56. See Mar del Plata U.N. Water Conference Report., op. cit. pp. 59-60; International Law Association, Report of the Forty-eighth Conference held at New York, 1-7 September, 1958, (London, 1959); Egypt-U.K.: Agreement concerning financing of schemes for village water supplies, in U.N.T.S., Vol.105, p.15; Ethiopia-World Bank: Guarantee agreement on Finchaa Hydroelectric Project, 9 May, 1969, in U.N.T.S., Vol.711, p.247; Nigeria-World Bank: Guarantee Agreement on Kainji Project, (Suppl.), in U.N.T.S., Vol.673, p.181; U.N. Dept. Of Economic and Social Affairs, Doc.ST/ESA/5 Natural Resources/ Water Series No.1, Management of Water Resources: Institutional and Legal Aspects, (UN., N.Y., 1975).



that every nation or people has permanent sovereignty over its natural resources, the Mar del Plata Conference adopted recommendations concerning policies of administering States, in the non-self-governing territories. The Conference noted with great concern the illegitimate exploitation of water resources of the countries and peoples subjected to colonialism, alien domination, racial discrimination and apartheid. It stressed that such exploitation of these resources is detrimental to promotion of the well-being of the indigenous peoples in those countries and territories. In support of that view point, the Conference resolved that it:

1. Affirms the inalienable right of the people of the countries under colonial and alien domination in their struggle to regain effective control over their natural resources, including water resources;
2. Recognises that the development of water resources in territories subjected to colonialism, alien domination, racial discrimination and apartheid, should be directed for the beneficial use of the indigenous peoples who are the legitimate beneficiaries of their natural resources, including water resources;
3. Denounces any policies by the colonising and/or dominating Powers contrary to the provisions of paragraph 2 of the present resolution, and particularly in Palestine, Zimbabwe, Namibia and Azania.<sup>57</sup>

It is apparent that the above resolutions are in support of the exercise of economic self-determination by the

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57. See Mar del Plata U.N. Water Conference Report. Recommendations on the water policies in the occupied territories, pp.80-81; General Assembly resolution 3171 (XXVII) of 17th December, 1973, "Permanent sovereignty over natural resources", and the consideration of the statement made by representatives of the United Nations Council for Namibia and the Palestine Liberation Organisation; General Assembly resolution 31/186 of 21 December, 1976, "Permanent sovereignty over national resources in the occupied Arab territories" in the Mar del Plata Water Conference Report, p.80.



peoples and nations still striving to regain political independence. Thus it is argued that the principle of economic self-determination must apply to all nations and peoples irrespective of the fact that such nations and peoples may not be exercising their full political rights at the time.

Having discussed the resolution of the U.N. Water Conference it is necessary to consider those of the U.N. Economic Commission for Africa. It must be stated from the beginning that since the Commission is a U.N. regional body whose work reflects and represents the African States' position, its recommendations also reflect the African States' opinion. Moreover, the Commission has established a co-ordinated working relationship with African countries. By virtue of this it may be stated that recommendations or resolutions of the Commission at any U.N. or other international gatherings, reflect the opinions and views of African member States.

However, even though the resolutions of the O.A.U. get to such U.N. gatherings as the Mar del Plata Water Conference through the intermediation of U.N.E.C.A., the O.A.U. does some preparatory work for such conferences either alone or in conjunction with the Economic Commission for Africa.

A group of 37 African countries met in Addis Ababa to prepare for the Mar del Plata Water Conference. The "African Regional Meeting"<sup>58</sup> preparing for the Water

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58. See U.N.E.C.A. Regional Report, Part Three, for the African Regional Meeting preparing for the United Nations Water Conference in Mar del Plata, op.cit., p.59.

Conference formulated and defined the O.A.U. bargaining position to be adopted by the African representation at the conference. The African Regional Meeting noted in the preamble of its recommendations that the Meeting had analysed the principal problems in the utilisation, management and development of water resources in Africa, and the related problems of planning and available policy options, in the light of reports presented by member States and by international, governmental and non-governmental specialised agencies. The Meeting then adopted the following two sets of resolutions:

1. water, being the basic for the sustenance of all forms of life, should be conserved, developed and used solely in the public interest;
2. the management and development of water resources is one of the most important factors in the human, social and economic development in Africa to ensure a better quality of human life and promote full human dignity and happiness.<sup>59</sup>

This first set of resolutions is concerned with the general use and utilisation necessities. They convey the message that the utilisation of African water resources must benefit the African populations at large. The second set of those resolutions were a recognition by the Meeting:

1. that the nature and magnitude of water problems represented a big challenge to the countries of the region, requiring their priority attention;
2. that the problems should be considered within the general context of economic development;

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59. See Ibid., p.59.



3. that it is urgently necessary to adopt adequate measures for the formulation and implementation of comprehensive national water plans as integral parts of national development plans;
4. that the regional and international co-operation in the development of international river basins requires to be fostered, promoted and strengthened; and
5. that the scope of international financing and technical assistance aspects should be broadened .....60

It is clear that the Meeting looked at water development and utilisation problems in a broad context and that on the question of international river basins it stated what was later reiterated by the Economic Commission for Africa at the Mar del Plata U.N. Water Conference.

In view of all the problems concerning the need to create an adequate institutional infrastructure, the Economic Commission for Africa recommends that the member States should: (a) ensure a better utilisation and strengthening of existing institutions; (b) protect public interests; (c) to facilitate greater participation of users in the planning, utilisation, management and conservation of water resources, and (d) prevent all forms of pollution, over or under exploitation.<sup>61</sup>

To achieve the objective of creating adequate institutions, the Commission recommended: inter alia, the promotion of closer co-operation especially at sub-regional level; increase in training of manpower from within the African populations; promotion of scientific

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60. See Mar del Plata U.N. Water Conference, "Economic Commission for Africa Regional Report", op.cit., p.84; Tunisia-World Bank: Guarantee Agreement for Port Project, 29 November, 1968, in U.N.T.S., Vol.738, p.107; K. Brown, "Africa's Great Project Boom", in African Development, Vol.II, 1969.

61. See Ibid.; Caponera, "Legal and institutional aspects of water resources development in Africa", op.cit.; ...../

studies; and formulation of new legal framework within the basin States. The creation or strengthening of economic institutions at regional level were also recommended and the contents of these recommendations is similar to those of the U.N. Water Conference on sub-regional organisations. But here perhaps U.N.E.C.A. recommendation (XII) deserves mentioning. It provides for the setting up "at regional level", of working groups to examine in depth and make suitable recommendations concerning the most appropriate institutional arrangements which could effectively assist member States in their activities in the field of water resources development and utilisation.

At the international level it is recommended that in order to ensure the orderly follow up of the implementation of the Water Conference recommendations, the United Nations should establish a permanent organisation or secretariat to monitor the progress being made in that direction. But such a permanent organisation would include in its functions, to assist in co-ordinating the activities of the United Nations in that field.

It must be stated here that well before the United Nations began its activities in the promotion of development and utilisation of African Water resources, the African States were already at work doing that job for themselves. International institutions already exist. The following are just some of such institutions: Lake Chad Basin Commission; Niger River Basin Commission; The Organisation pour la mise en valeur du fleuve Senegal



and Permanent Joint Technical Commission for the Nile Waters.<sup>62</sup>

The functions and competence of some of the river utilisation and development institutions mentioned above are discussed below. In the case of river basins where there are no institutions yet established, for the promotion of multinational co-operation, consideration is being given to the establishment by basin States of such institutions. Again, the objectives here are similar to those mentioned above, namely:

- i) to promote scientific studies of a particular basin;
- ii) to formulate basin-wide plans for the integrated utilisation and development of the basin's natural resources;
- iii) to promote a legal and institutional international framework within the basin States;
- iv) to undertake training of Africans, locally and abroad so as to create the necessary cadres of personnel in different disciplines and fields of integrated river basin utilisation and development;
- v) to stimulate scientific research and undertake seriously the responsibility of introducing new technologies or transferring them to the basin to reduce progressively the dependence on foreign consultancy by promoting national organisations and consultancy enterprises.

The establishment of an institutional arrangement within the major basins, at a multinational level, will vigorously support the integration of river basin development and will enable the nationals of the basin States to direct and control the utilisation and development of river basin natural resources in a way

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62. See for example, Agreement concerning the Niger Basin Commission, loc.cit.; Agreement concerning the Lake Chad Commission, loc.cit.

desirable to all the basin States. Such an institution would surely give optimum benefits to the populations of the basin States as a whole.

It is important to note that whenever any aspect of problems in the area of water utilisation and development in Africa is discussed, recommendations to set up institutional frameworks for project implementation and ensuring continuity of action are put forward. This in itself shows that African States and all other organisations participating in the economic development of international river basins of the continent are committed to the formulation of comprehensive international legal regimes and the establishment of adequate institutions to serve the development of particular African international river basins.

Examination of the African and U.N. Water Conference resolutions and recommendations reveal that there is a lack of international legal regimes to regulate utilisation and development of African water resources. The recommendations and resolutions also show that there are not enough international institutions (river basins commissions, etc.,) to carry out related tasks of uses and development of African international river basins and lakes.

However, the most important points that emerge from the discussions are:

1. Lack of international institutions to regulate the utilisation of African international river basins is well known to the U.N. and O.A.U. While need for international action has been recognised, tangible actions



are still in the formative stages.

2. In order to effectively promote efficient utilisation and development of their water resources, African States need to create international institutions at continental and sub-regional levels. But they have to emphasise the promotion of co-operation at sub-regional level.

3. The institutional legal regimes employed at both levels of co-operation must be as broad as possible, covering all areas of co-operation and development of a particular river basin or lake.

4. The need for African States to formulate basin-wide plans for the integrated utilisation and development of the basin's natural resources.

5. The scope of international financing and technical assistance aspects should be broadened and be based on flexible operational criteria suitable to the particular conditions of each country, sub-region and the whole African region.

6. The need to train Africans, locally and abroad so as to create the necessary cadres of personnel in different disciplines and fields of integrated river basin utilisation and development.

#### Section D. Institutional aspect of economic utilisation and use of African international river basins.

In this section we examine the provisions of the existing international institutions (river commissions) in Africa. Since it was only after attainment of political independence that African States started to enter into

treaty relationships with one another regarding utilisation and development of their international river basins and lakes, the international legal instruments here analysed are those treaties and agreements which were concluded between independent African countries. It therefore follows that international river basins in the Southern African sub-region where some of the countries have not yet gained political independence are not examined. This is so simply because the countries of the sub-region have not established any legal framework to regulate the use of their international rivers. There are no international institutions for that purpose in the sub-region.

Perhaps it should be remembered that in the previous section the inadequacy of international river institutions common in the whole African continent, was disclosed. This means that not only in the Southern African sub-region is institutional regulation lacking, but as this section will reveal, such institutions are inadequate or scarce in other sub-regions as well. Despite the fact that it is not the aim of this section to show the development of international river law in Africa,<sup>63</sup> perhaps it may be useful to state that the development of the law can be divided into two stages. The first stage being the pre-independence era, and the second, the post-independence period.<sup>64</sup>

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63. See Caponera, "Legal and institutional aspects of water resources development in Africa", loc.cit.; Ian Brownlie, "A Provisional View of the dispute concerning Sovereignty over Lake Malawi/Nyasa", in East African Law Review, Vol. 1, 1968, p.258.

64. See Official Records of Economic and Social Council, Twenty-eighth Session, Suppl.No.4, on the development of international River Law; G. Kaackenbeeck, International .../



The pre-independence era is characterised by the presence of treaties and international agreements concluded between European administrative authorities themselves, concerning the utilisation of African international river basins.<sup>65</sup> As shown in Section A above, the legal regimes used to regulate those pre-independence river institutions and indeed to regulate the particular river basins were not as broad as the regimes of today. The difference between present and pre-independence legal regimes, again as shown above, lies in the purposes of use and utilisation of a river basin. The pre-independence uses were limited to specific utility, e.g. irrigation, navigation, etc.

In the post-independence period, African international river law<sup>66</sup> regulates relationships concerning the multi-purpose uses of African international river basins. Due to the fact that expressly or tacitly, African States exercise their economic sovereignty in the process of utilisation and development of non-navigational

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64. Continued .....

Rivers, (Historical Section, U.K. Foreign Office, London, 1920); R.R. Baxter, The Law of International Waterways with particular regard to Interoceanic Canals, (Cambridge, Mass.: Harvard University Press, 1964); G. Kaeckenbeeck, International Rivers: A Monograph based on Diplomatic Documents, (London, 1962).

65. See U.K.-Portugal: Treaty concerning the Shire Valley Project, loc.cit. above; Kaeckenbeeck, op.cit.; Alias on Berlin Conference and the Regulation of International Rivers, loc.cit., above.

66. See K.K. Batstone, "The utilisation of the Nile Waters", in The International and Comparative Law Quarterly, Vol. 8, 1959, pp.535-58; N. Hosni, "The Nile Regime", in Revue Egyptienne de Droit Internationale, Vol.17, 1961, pp.70-79; C.A. Pompe, "The Nile Waters Question", in Symbolae Verzijl Presentees au Professeur J.H.W. Verzijl a l'occasion de son LXX-leme anniversaire, (Den Haag, Nijhoff, 1958), pp.275-94.

uses of international watercourses, post-independence African institutional law in this field provides for the establishment of comprehensive institutional frameworks for co-operation.

The Agreement establishing the River Niger Commission with respect to navigation and transport on the River Niger was signed at Naimey on 25th November, 1964. It was amended on 2nd February, 1968. The Commission's Headquarters is in Naimey, in the Republic of Niger. The objectives of this inter-governmental Commission are inter alia, to encourage, promote and co-ordinate studies and programmes relating to the utilisation and development of the resources of the Niger River Basin. Under Article 2 of the Agreement concerning the Niger River Commission, the Commission have the following functions, and in particular:

- (a) to prepare General Regulations which will permit the full application of the principles set forth in the Act of Naimey, and to ensure their effective application. The General Regulations and the other decisions of the Commission shall after approval by the Riparian States and after a time-limit fixed by the Commission, have binding force as regards relations among the States as well as their internal regulation.
- (b) to maintain liaison between the riparian States in order to ensure the most effective use of water and resources of the River Niger Basin.
- (c) to collect, evaluate and disseminate basic data on the whole of the basin, to examine the projects prepared by the riparian States, and to recommend to the Governments of the riparian States plans for common studies and works for the judicious utilisation and development of the resources of the basin.
- (d) to follow the progress of the execution of



studies and works in the basin and to keep the riparian States informed, at least once a year thereon, through systematic and periodic reports which each State shall submit to it.

- (e) to draw up General Regulations regarding all forms of navigation on the River.
- (f) to draw up staff regulations and to ensure their application.
- (g) to examine complaints and to promote the settlement of disputes and the resolution of differences.
- (h) generally, to supervise the implementation of the provisions of the Act of Naimey and the present Agreement.<sup>67</sup>

It appears from the above cited Article that the Commission has the competence to make regulations which when they come into force will bind the riparian member States. In the formulation of the general regulations which will bind it, each riparian State has to approve the regulations. These general regulations become internal regulations of the riparian States concerning the utilisation and development of the Niger River Basin.

Since the Commission has as its functions the duty to collect, evaluate and disseminate basic data, to examine projects prepared by States and recommend to Governments plans for common studies and works, to follow the progress States make in implementing or executing works and studies; the full participation of all riparians (members to the Agreement), in the utilisation and development of the Niger water and resources is legally provided for. It is also indicated that the general supervision concerning the implementation of the provisions of the Act of Naimey and the Agreement is

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67. See Agreement concerning the Niger River Commission, loc.cit. above.

included in the function of the Commission. In the event of any dispute or complaint arising between the member States, the Commission shall examine them and promote the pacific settlement of such disputes.

The institutional structure of the Commission is composed of the Council of Ministers and an Executive Secretariat. Under Article 3, the Council of Ministers is constituted by nine Commissioners one from each riparian State. The Commission which may be assisted by a group of experts, has the power to establish its own Rules of Procedure. The Council of Ministers is an advisory body, whose decisions are taken by a two-thirds majority vote. The Council of Ministers meets once a year and elects its own Chairman from among its members. It may meet in extraordinary sessions only at the joint request of any three of the riparian States, who would have to address such a request to the Administrative Secretary.

According to Article 6 of the Agreement, the Executive Secretariat is the executive body of the Commission. Each riparian State is entitled to nominate a candidate for the office of Administrative Secretary but it is the Council of Ministers which, by a two-thirds majority vote, appoints the Executive Secretary. The Executive Secretary who holds office for three years and is eligible for re-appointment, has his duties and powers determined by the Council of Ministers, to which he or she is responsible. The conditions of the Executive Secretary's Service are defined in the Staff Regulations.



Article 10 stipulates that the riparian States shall contribute to the budget of the Commission. This is done in proportions determined by the Commission. The Commission after having established an annual budget, then submits it to the riparian States for approval. If the Commission renders any special service to a State, the expenditure incurred in respect of such service is paid by that particular State, thus ensuring that money spent from the Commission's budget in promoting individual State projects is paid back by that individual user.

It may be mentioned here that the activities of the Commission so far have been confined mainly to fishing, hydrology, hydro-geology, solar energy and transport, thus leaving many other areas of water resources exploitation untouched.

Utilisation of the Niger River Basin waters for agricultural, industrial,<sup>68</sup> and other developments is provided by Article 12 of the Commission Agreement. Under that Article:

In order to achieve maximum co-operation in connection with the matters mentioned in Article 4 of the Act of Naimy, the riparian States undertake to inform the Commission as provided for in Chapter 1 of the present Agreement, at the earliest stage, of all studies and works upon which they propose to embark. They undertake further to abstain from carrying out on the portion of the River, its tributaries and sub-tributaries subject to their jurisdiction any works likely to pollute the waters, or any modification likely to affect biological characteristics of its fauna and flora, without adequate notice to, and prior consultation with, the Commission.

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68. See Nigeria: Notice of 1967 prohibiting shipping zone off Coast of Eastern Region (Biafra), in International Legal Materials, Vol.6, 1967, pp.682-1174; UNCTAD., Report of the Committee on Shipping on the first part of its fifth session, 22 March - 23 April, 1971, (Suppl.No. 3), (UN., N.Y., 1973).

It is clear that under the above Article, the Commission has the power to supervise all works and studies in the agricultural and industrial utilisation and development of the River Niger Basin.

As regards navigation and transport, Article 15 stipulates:

The River Niger Commission shall establish general regulations to ensure the safety and control of navigation on the understanding that such regulations shall be designed to facilitate, as much as possible, the movement of vessels and boats.

Article 14 mentions that navigation on the River Niger is open to international traffic within the framework of specific regulations set out by the Commission and approved by the riparian States. Thus ensuring the general international law requirement of free navigation of ships and any other vessels of foreign States in the national territorial waters. This means that apart from the ships or vessels of the riparian States, vessels of the third party States may use the River Niger waters for navigation purposes. But third party State vessels will have to comply with the regulations formulated and enforced by the River Niger Commission. One interesting observation is that membership of the Niger River Commission is open and in fact includes not only the riparian States, of the Niger River, but also those of its tributaries and sub-tributaries feeding the River Niger. There is also a practice operated by the Commission, of granting certain States observer status should it be found necessary. Thus Togo is associated



with the Commission as an observer. This ensures the widest participation in utilisation and economic development of the Niger River Basin.

The 1959 River Nile Agreement contains specific provisions concerning the establishment of an institution to promote the development and utilisation of the waters of the Nile River Basin.<sup>69</sup> Article 4 entitled "Technical Co-operation Between the Two Republics" contains three paragraphs describing the functions and composition of such an institution.

For the purpose of ensuring technical co-operation between the parties, so as to continue the research and study necessary for the Nile control projects, and to continue the hydrological survey, to mention a few of the objectives, the two riparian States decided immediately after the signing of the Nile Agreement, to set up a Permanent Joint Technical Commission. This Commission is formed of an equal number of Commissioners from both parties.

The functions of the Permanent Joint Technical Commission include:

- i) The drawing up of outlines of projects necessary for the increase in river yield, and the supervision of the studies before finalising a project, which is later presented to the two Governments for approval.
- ii) The supervision of the execution of projects approved by the Governments of the two riparian States.
- iii) The drawing up of any working arrangements for the works to be constructed on the Nile, within Sudan or outside it, when the outside constructions are

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69. See Agreement on utilisation of Nile Waters, loc.cit. above; Egypt-U.K.: Exchange of Notes on Co-operation in Meteorological and Hydrological Survey in certain Areas of the Nile Basin 18 January - 20 March, 1950, in U.N.T.S., Vol.226, p.287.

by agreement with the authorities in whose country the works are to be constructed.

- iv) The supervision of the application of the working arrangements mentioned above (ii) and the supervision of the working of the Upper Nile projects, as provided in the agreements concluded with the countries in which such projects are being constructed.
- v) The devising of a fair arrangement for the distribution of the uses of waters from the Sudd el Aali Reservoir during any low yield period of the year. And presentation of its recommendations on such matters to the Governments of the Sudan and Egypt.

Paragraph 2 of Article 4 also stipulates that in order for the Commission to exercise its functions, when dealing with the projects constructed on the River Nile and its tributaries, its duties are carried out under the technical supervision of the Commission by its engineers of the Sudanese Republic, and its engineers of the Republic of Egypt in the Sudan or in Egypt itself, and by Egyptian engineers in Uganda.<sup>70</sup>

We find here that though Uganda is not party to the Nile Agreement, because of the latter being a riparian of one of the Nile tributaries where works and other development projects could be or have been constructed, the Nile Agreement allows room for Uganda and indeed any other interested riparians to enter into agreement with the Sudan and Egypt should these other riparians wish to construct any works or conduct studies on the development and utilisation of the River Nile resources. This is deemed to permit broader participation by all riparians in order to increase the benefits to all which accrue

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70. See Egypt-U.K.: Agreement concerning the construction of the Owen Falls Dam, (Uganda), in U.N.T.S., Vol.226, p.273.



out of such wide development of the River Nile and its tributaries. According to paragraph 3 of the same Article, the Governments of Egypt and the Sudan shall form the Joint Technical Commission, by issuing a joint decree, and the Commission shall be provided with funds from the budgets of the two countries. As it shall be necessary, the Commission may hold its meetings in either Cairo or Khartoum. This indicates that the Commission does not have a permanent administrative Headquarters, but rather may rotate its sessions as deemed necessary. The Commission lays down regulations for the organisation of meetings and its technical, administrative and financial functions, but such regulations must be approved by the two member States.

The Organisation for the Development of the Senegal River (OMVS) is currently the institution engaged with the development and promotion of co-ordination between the riparian States. The OMVS was established on the basis of the Convention signed at Nouakchott, Mauritania, on March 11, 1972. Its Administrative Headquarters are in Dakar, Senegal, and its membership comprises Mali, Mauritania and Senegal. The main objective of the OMVS is to apply the Convention relating to the status of the Senegal River, for the promotion and co-ordination of studies and works aimed at the development of the resources of the Senegal River Basin in the national territories of the member States. It carries out any technical or economic mission which the member States

assign to it. The institutional structure of the organisation is constituted by the Conference of the Heads of State and Government and the Council of Ministers. The Heads of State and Government being the policy-making organ, whose functions include the examination and approval of recommendations made by the Council of Ministers. The decisions of that policy-making organ are reached unanimously and are binding on all the member States. The Council of Ministers which is composed of representatives of the member States, primarily does the planning and supervision of the execution of projects and works. It may be assisted by technical and economic organs. It also prepares and proposes general policy measures concerning the objectives of the organisation and it approves the budget of the institutions and organs of the Organisation and is responsible to the Conference of the Heads of State and Government. Its recommendations and acts are unanimous. The every day activities of the Organisation are run by an administrative Executive Secretariat, which functions under the supervision of the Secretary-General who is responsible for the implementation of the decisions of the Conference of Heads of State and Government and those of the Council of Ministers.

On the question of promoting studies relating to the development of the Senegal River, the OMVS has achieved tremendous results. In May, 1974, a document

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71. See THE OBJECTIVES AND THE MAIN OUTLINE OF THE INTEGRATED DEVELOPMENT STRATEGY OF THE SENEGAL RIVER BASIN: prepared by the national committee for the development of the Senegal River, of the Republic of Mali, of the .... /



prepared by the national committees of the riparian States, dealing with the development of the Senegal River, was published.

One of the chapters deals with the attempts to develop the Senegal River in the past.<sup>72</sup> The document has a recommendatory character, and since this thesis is concerned with the discussion and analysis of the law it is not necessary to undertake a detailed discussion of the contents of the document in this work.

As is shown below, since their attainment of political independence the Senegal River riparian States have concluded several treaties concerning the economic development and use of that river. Of these treaties, the latest was the 1972 OMVS Convention. But this convention is considered to be merely a development of the 1963 Convention<sup>73</sup> relating to the status of Senegal River. It is the 1963 Senegal River Convention

71. Continued .....

Islamic Republic of Mauritania, of the Republic of Senegal and the Secretariat General of OMVS for the Governments and organisations invited to participate in financing the development of the Senegal River Basin, May, 1974.

72. It has to be mentioned that the OMVS replaced the Organisation of Senegal River States (OERS) (whose Statute is analysed below). The OERS, which had consisted of Guinea, Mali, Mauritania and Senegal, and whose objectives had included cultural and political as well as economic co-operation, came to an end on 29 November, 1971 after Guinea had boycotted its meetings for a year and Senegal resigned from it. The Organisation which now operates without Guinea, is open to all riparian States of the Senegal River. The objectives of the OMVS are, generally speaking, limited to the same economic objectives as the Inter-State Committee for the Development of the Senegal River Basin which had been established in July 1963 between Guinea, Mali, Mauritania and Senegal and which in its turn, had been replaced by the OERS with its wider objectives.

73. For the French text of the Convention, see Journal officiel de la Republique du Senegal, 20 February, 1965.

along with the Lake Chad and Niger River Treaties which are considered to be "outstanding examples of international recognition of the interdependence of the various parts of a river basin".<sup>74</sup> Because this kind of general recognition is accorded to that legal instrument, it is examined below.

Discussion of the Statute is deemed to reveal the institutional aspect of the regulation of the development and utilisation of the resources of the River Senegal. Moreover, it does not appear as if there is any essential difference between the Statute and present Convention, as regards the objectives of institutional regulation of the River.

The Statute of OERS provides that the purposes of the organisation among others, are to promote mutual understanding and co-operation among the parties, as well as develop and promote an integrated economic development<sup>75</sup> of the whole West African Region. But what is more important for this work is that the Statute stipulates in paragraph 2 of Article 1, that one of the purposes of this inter-governmental organisation is:

to promote the development, economic independence and social progress of the member States by far-reaching co-operation,

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74. See the Yearbook of the International Law Commission, 1976, Vol.II, Part One, p.189; I.O. Agoro, "The establishment of the Chad Commission", in International and Comparative Law Quarterly, Vol.15, 1966, pp.542-550; African Research Bulletin: EC/FIN/TECHN-Series, Vol.14, 1970, "Chad Basin Commission Conference", p.1555; Ibid., "Organisation of the Senegal River States (OEORS): River navigation Plan", p.1669, loc.cit. above.

75. See R. Hall, "A hard look at the Dams in Africa: Review of Dams in Africa", in African Development March, 1969, p.24; U.N. Agricultural Economic Bulletin for Africa, No.6, 1964, "Fisheries: A note on the fisheries of Africa: Study by U.N.F.A.O.", p.13.



including the harmonisation of their efforts to achieve concerted projects in the following fields: (a) agriculture and animal husbandry, (b) education, training and information, (c) public health, (d) industrial development, (e) transport and telecommunications, (f) trade, (g) judicial co-operation and harmonisation of civil and commercial legislation.

Though it has been noticed that the Senegal Riparian States have changed the structure of the organisation under the new legal instrument (Convention), these States have actually achieved with great success the harmonisation of their civil codes legislation by introducing a unified "Water Code".

The Water Code was presented to the O.A.U. so as to allow other O.A.U. member States to study it with a view to adopting a similar unification of their water laws, in their respective sub-regions. Another provision of the Statute which has been implemented is paragraph 4 of the same Article 1. This speaks of the promotion, in accordance with the Charter of the O.A.U. of the establishment of the West African Regional Group of States, with a view to implementing African Unity. To that effect the Senegal River Riparian States have joined with other West African States to form the West African Economic Community.

To confirm progressive implementation of the principle of sub-regional co-operation regarding the utilisation and development of water resources, the Senegal River Riparian States, have sought to conclude a multinational convention. This is provided for by Article 5 of the Statute. It would follow, therefore, that the formation of the 1972 O.M.V.S. Convention was

intended to be, an implementation of one of the purposes of the O.E.R.S.

The structure of the O.E.R.S. is slightly different from that of the O.M.V.S. The O.E.R.S. included the Conference of Heads of State and Government; the Council of Ministers; and the Inter-Parliamentary Commission. Articles 7-13 of the Statute describe the functions and composition of the Conference of Heads of State and Government. The Conference of Heads of State and Government is the supreme authority of the Organisation of the Senegal Riparian States (Article 7).<sup>76</sup> The members of the O.E.R.S. had one vote each and they reached their decision unanimously, the decisions of the Conference being binding on them. Hence they undertook to implement these decisions (Article 12). It may be mentioned that the functions and competence of the Conference is similar to that provided for it under the O.M.V.S. Convention of 1972.

Whereas under the Convention the Council of Ministers is primarily an institution for planning and supervision, under the Statute the Council of Ministers' primary functions were to make the policy of the Organisation, ensure execution of that policy and to supervise projects. The Council of Ministers had under it such organs as the Executive Secretariat, the General Secretariat for the development of the River, the General Secretariat for Planning and Development, the General Secretariat

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76. The Organisation of the Senegal Riparian States, consisted of: The Republic of Guinea, the Republic of Mali, the Islamic Republic of Mauritania, and the Republic of Senegal.



of Education, Cultural and Social Affairs. Most of these organs disappear under the 1972 Convention and are replaced by the Administrative Secretariat performing functions of supervision and implementation of decisions of the Conference of the Heads of State and Government.

Under Article 19 the Inter-Parliamentary Commission consisted of five members of parliament from each riparian State. Its duties included the supervision of the activities of the O.E.R.S. and to inform the member States National Assemblies. It used to meet twice a year and was responsible for convening its own meetings.

Articles 28 and 29 of the Statute deal with the question of the budgets of the O.E.R.S and those of its organs. The member States made contributions to the O.E.R.S. budget. The budgets of the institutions and organs of the O.E.R.S. after being prepared by the Executive Secretariat and by the General Secretaries of the Organisation, had to be adopted by the Council of Ministers. We find that financial arrangements for the development of the Senegal River Basin are organised by or comes from the national budgets of the member States by way of contributions. It follows that if every member State contributes to the budgets of the Water Commission, the projects that are established within the framework of the Statute are financed by the members, whether the money comes directly from the riparian States or is borrowed by them to finance any projects which are established in order to meet the

objectives of the Organisation.

Another institution we may discuss is the Mano River Union.<sup>77</sup> This is an economic river utilisation Union between Liberia and Sierra Leone. The Union was established by the Mano River Declaration signed on the 3 October, 1973. Its Headquarters are in Freetown, Sierra Leone.

The objective of the Union is to establish a Customs Union between the member States. The task was to be completed in stages. Complete liberalisation of trade in goods originating from the two countries was expected to be attained by the end of 1976. The Union Ministerial Council, which is composed of the Ministers of Planning, Finance, Education, Trade, Industry, Agriculture, Transport Communications, Power and Works, in the two Republics, is the supreme body of the Union. The Ministerial Council makes recommendations to the Heads of State, issues resolutions for action by the Secretariat or by the member State Governments. It may also take other decisions which might be deemed necessary. It meets at least once a year.

There is a Union Standing Committee which is composed of high ranking officers of the two countries, who meet to draw up the agenda for the meeting of the Council of Ministers.

The Union has five sub-committees for Trade and Industry, Agriculture, Forestry and Fisheries, Transport, Communications and Power, Education, Training and Research,

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77. See The Mano River Union, in U.N. Economic Commission for Africa (E/CN/14/CEC/1 Rev.2) "Directory of Inter-Governmental Co-operation Organisations in Africa", (UN., N.Y., 1976).



Finance and Administration. These sub-committees consist of senior professional officers from the two Republics. There is also a Union Secretariat headed by the Secretary-General who is assisted by two Deputy Secretary-Generals appointed by the Presidents of the two Republics upon the recommendation of the Union Council of Ministers.

It is clear that the Mano River Union has a wide scope of operation: that it promotes a wide range of areas of economic co-operation between Sierra Leone and Liberia. The two Mano River riparian States have undertaken to promote the development, not only relating to the utilisation and development of the river waters, but have chosen to widen the development of the two countries to include all those other areas mentioned above.

Among other jointly established projects, a bridge across the Mano River linking the two countries has been completed. In order to carry out some of its projects, the Union has also requested assistance from the UNDP.

After discussion above in the Chapter it may be concluded that:

- 1) There is scarcity or inadequacy of legal and institutional regulation of water resources development in Africa. This inadequacy arises from the evolving high expectations which the States have about the international rivers community and from the principles that have emerged. But the development of such principles is in itself a manifestation of economic self-determination.
- 2) Realising this inadequacy of both legal and institutional regulation of economic utilisation of

their international river basins, African States formulate new international legal norms and establish new institutions, within which framework utilisation is conducted. These new laws and institutions have replaced old colonial legal regimes and arrangements made by former metropolitan States.

3) The basic principles employed to regulate the utilisation and economic uses of African international river basin resources are:

a) "community of coriparian States in the water of an international river" which is replacing the concept of "riparian rights". In Africa, the principle of a community of coriparian states is being implemented through the legal and institutional machineries.

b) "Equitable utilisation of the waters of an international drainage basin" which, while extending as far as the principle of a community in the waters, nevertheless limits the exercise of absolute sovereignty to the extent necessary to ensure that each co-basin state had a reasonable use of the waters of an international river basin. This provides a wider spectrum regarding the operation of "the greatest beneficial use" or multi-purpose economic utilisation of African international rivers.

4) African States need to emphasise their co-operation at sub-regional level and to formulate basin-wide plans or regimes for the integrated development of a particular international river basin in that sub-region. However, States of a particular sub-region must not limit themselves



to the application of the concept of geographical co-operation alone, but may welcome the co-operation of outside governments and international bodies willing to participate in the utilisation of a particular river in that sub-region.

## CHAPTER 5

### SELF-DETERMINATION AND TERRITORIAL CONTROVERSIES

#### Section A. The governing international legal regime

In this chapter we are concerned with those international legal problems which arise from the need of African States and Peoples to exercise their territorial and economic sovereignty. It must be noted, however, that some of the international legal regimes which may be employed to regulate matters regarding self-determination and territorial controversies, may tacitly or expressly, concern the exercise of self-determination by Peoples and Nations, or States. On one hand, States as subjects of international law, have the right to determine their political and economic affairs. Thus they have sovereignty over their territories. Desiring to promote their economic sovereignty, African States, like any other group of States, invoke legal ways and means to consolidate their political unity and territorial integrity.<sup>1</sup> On the other hand, Peoples and Nations, being subjects of the principles of self-determination, may exercise that right, if they so wish, to establish their own independent State. Thus in some territorial

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1. See the Charter of the Organisation of African Unity (preamble, Articles 1, 2 and 3), in Brownlie, Basic Documents in International Law, pp.68-70, loc.cit. above; Resolutions of the First Conference of Independent African States, 1958, in Brownlie, Basic Documents on Human Rights, pp.431-434, loc.cit. above; Ibid., Second Conference of Independent African States, 1960, pp.435-439; Ibid., LAGOS CONFERENCE ON THE RULE OF LAW, 1961, pp.440-450; Ibid., RESOLUTIONS OF THE FIRST ASSEMBLY OF THE HEADS OF STATE AND GOVERNMENTS OF THE ORGANISATION OF AFRICAN UNITY, 1964, pp.451-454; T.O. Elias, Nigeria: The development of its laws and constitution, (The British Commonwealth: Development of its laws and constitutions), Vol.14, (London, 1967); ...../



or boundary controversies in Africa, there may be valuable distinction between the right of states and that of people regarding the exercise of self-determination. This happens when the State expresses its determination to preserve its territorial integrity and a part of its People express their will to exercise self-determination which would either lead them to establish their own State or to join another independent African State.<sup>2</sup> But when a dispute arises, as to whose sovereignty is to be allowed the upper hand, existing national legal channels and binding international legal regimes must be utilised to resolve the controversy.

It is now clear that both the States and Peoples (people striving to establish statehood), may exercise territorial and economic sovereignty. And because of the fact that in the absence of the land (territory), there cannot be any exercise of economic sovereignty, boundary or territorial controversies are interlinked with the exercise of economic self-determination. Without conducting some form of economic activity, (no matter how advanced or primitive such economic activity may be) human life will cease to exist in the form it is known

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1. Continued .....

T.O. Elias, Ghana, and Sierra Leone: The development of their laws and constitutions, (The British Commonwealth, Vol.10, (London, 1962); see also other Chapters in this thesis.

2. See Okeke, Controversial subjects of contemporary international law, "The status and treaty-making capacity of organs of national liberation movements"; pp.109-127; Ibid., "The case of Biafra", pp.158-177, loc.cit., above; see also Chapters 1 and 2 in this thesis above; Cases on boundary and territorial disputes discussed below in this Chapter.

today. This fact suggests therefore, that territorial or boundary disputes emanate from economic interests. Professor T.O. Elias observed, that economic considerations sparked a dispute between Nigeria and the Cameroons. The dispute concerns the determination of the exact boundary line both offshore "because of the mineral oil found there"<sup>3</sup> and inland between the two countries. Thus economic reasons are invariably behind the political disputes.

The legal standpoint of African States, regarding the kind of international legal regimes to be utilised as regulatory yardsticks in the event of controversies, is as set out in the Charter of the Organisation of African Unity viz., that member States must have: "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence", Article 3(3). The position of the United Nations on the same issue is defined by Article 2(4) of the U.N. Charter which stipulates: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purpose of the United Nations". This same principle is reiterated by the U.N. General Assembly in its "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations",<sup>4</sup> (U.N. General Assembly resolution

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3. See T.O. Elias, Africa and the Development of International Law, (London, 1972). See also discussions in this Chapter below, on further illustrations of the point that territorial or boundary disputes emanate from economic interests.

4. See U.N. General Assembly resolution 2625 (XXV), 24 October, 1970, loc.cit. above.



2625 (XXV), 24 October, 1970). But in order to understand the O.A.U. or U.N. law concerning the respect for territorial integrity and economic sovereignty of every State,<sup>5</sup> one is required to know something about the concept of State territory in modern international law.

In the words of Ian Brownlie:

The state territory and its appurtenances (airspace and territorial sea), together with government and population within its frontiers, comprise the physical and social manifestations of the primary type of international legal person, the state. The legal competence of the states and the rules for their protection depend on and assume the existence of a stable, physically delimited, homeland. The competence of states in respect of their territory is usually described in terms of sovereignty and jurisdiction ....<sup>6</sup>

He goes on to state that the competence of a state is commonly described as its sovereignty and particular rights are described as jurisdiction. Thus sovereignty means legal personality of a certain kind, that of statehood, while jurisdiction refers to rights (or claims), liberties and powers.

It may be emphasised that the State territory might be described as that part of the world (globe) which is under the sovereignty of a State, including

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5. See U.N. General Assembly resolution 3283 (XXIX) 12 December, 1974, "Peaceful Settlement of International Disputes"; U.N. Resolutions encouraging peace-keeping efforts of the O.A.U. in Congo, in I.L.M., Vol.4, 1965, p.12; Catherine Hoskyns, Case Studies in African Diplomacy - 1, The Organisation of African Unity and the Congo Crisis, 1964-67, (Dar-es-Salaam, 1969); A.O. Cukwurah, The Settlement of Boundary Disputes in International Law, (Manchester, 1967); S.P. Sharma, "Boundary and Territorial Disputes: A Comparison", in I.J.I.L., Vol.10, 1970, p.158; S.A. Tiewul, "Relations between the U.N. and O.A.U. in settlement of Cessionist conflicts", in Harvard International Law Journal, Vol.16, 1975, p.259.
  6. See Brownlie, Principles of Public International Law, Second Edition, loc.cit., n.8, Ch.4., above, pp.109-110; ....

the land and its subsoil, the waters and the airspace over the land and the waters.

It is logical therefore, that the African peoples after having regained sovereignty over their lands, whose boundaries had been changed by the then ruling colonial powers, find it out of keeping with their interests to allow any territorial claims by any new African State, which, if allowed to materialise, would consequently lead to repartitioning of the already divided African nations. The position of the new African States on this issue of territorial claims and boundary re-defining is that, in order to resolve the problem there must be a drawing together of the African peoples through either sub-regional or regional unity. The reason why the African states would rather opt for the progressive idea of state-unity than to endorse any territorial claims is their great desire to organise and establish an all-African integrated economy. The idea of economic integration is seen by many African States as being paramount regarding the establishment of national or multinational enterprises. This strong feeling by African States in favour of integrated economic development overrides that of disintegration through territorial claims or boundary re-adjustment. The concept of State territorial sovereignty is analogous to that of State ownership and the right to exploit natural resources found within the State's territorial

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6. Continued .....

See Ibid., on: Territorial Sovereignty in general, pp. 109-182; Oppenheim, International Law: Vol.1, - PEACE, loc.cit. above, "State Territory", pp.451-581; Schwarzenberger, A Manual of International Law, Sixth Edition, loc.cit. "Territory", pp.95-107; Briggs, The Law of Nations, loc.cit.above, "TERRITORY AND TERRITORIAL JURISDICTION", pp.239-326.



jurisdiction. Since the legal competence of a State includes considerable liberties in respect of ownership and the right to dispose of its natural resources through the utilisation and development processes, some selfish and ambitious countries have gone so far as to forcibly annex other peoples' lands so as to utilise the natural resources in the conquered territories.<sup>7</sup>

It is no secret that the European colonial Powers who conquered the peoples of, and established their colonial rule and authority in, Africa sought both economic and political control.<sup>8</sup> After having established spheres of political control, the European colonial Powers gained control over the exploitation of both human and natural resources in those distant African territories. Thus, when the European colonial Powers established effective administrative control over the African continent, they transgressed the African peoples' territorial sovereignty. Colonial Powers simply treated African Peoples as "BARBARIANS" who did not deserve reciprocity treatment in international relations. Although "the rules of international behaviour imply reciprocity. But barbarians will not

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7. See R. Oliver and J.D. Fage, "The European Scramble for African Colonies", in Y. Tandon, Readings in African International Relations, Vol.1, (Nairobi, Kampala, Dar-es-Salaam, 1972), pp.33-44; R. Oliver and J.D. Fage, A Short History of Africa, (London, 1962), pp.181-196; R. Oliver, "The Purpose of Colonial Treaties", in Tandon, Readings in African International Relations, pp.53-56; R. Oliver, Sir Harry Johnson and the Scramble for Africa, (London, 1957).

8. See for example, "The Rudd Concession of 1888", in which "Lo Bengula, King of Matabeleland, Mashonaland, and other adjoining territories ...", is alleged to have given Cecil John Rhodes' personal agents, (C.D. Rudd, Rochfort Maure and G.T.Thompson) "the complete and ..."

reciprocate. They cannot be depended on for observing any rules. Their minds are not capable of so great an effort ...."<sup>9</sup> This shows the dual character of colonial diplomacy: one standard for governing the relations with fellow Europeans; another for governing the relations with the colonised peoples. The doctrine of non-interference in foreign nations which should have restrained European colonial Powers from interfering in African nations, did not apply to the colonised peoples. Hence the deprivation of the African peoples territorial sovereignty, in every respect hindered the progressive utilisation and development of natural resources in these colonised territories.

Any act therefore, by an African State concerning the claim of another's territory or concerning the re-defining of the colonially established boundaries, by way of territorial adjustment, is considered as an act of derogation of that State's territorial sovereignty which as shown above, would be followed by derogation of the State's permanent sovereignty over natural resources. The State's desire to exercise certain rights connected with the utilisation of natural and human resources may motivate it to claim territory of another, or demand an adjustment to the border territory in its favour. Dr. Oye Cukwurah notes that: "a recent

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8. Continued .....

exclusive charge over all metals and minerals situated and contained in (his) Kingdom...." The full text of the Rudd Concession is contained in Tandon, Readings in African International Relations, loc.cit.above, "A CASE STUDY OF AN "UNEQUAL" TREATY: THE RUDD CONCESSION OF 1888", pp.56-58; see also Lewis Mitchell, The Life and Time of ... Cecil John Rhodes, (Kennerley, 1910), I, pp.255-257.

9. See John Stuart Mill, "What kind of Relations with "Barbarians"?", in Tandon, Readings in African Inter-



discovery of gas and a hint of oil present in this region (the Ogaden Region of Ethiopia) long claimed by Somalia where almost all the inhabitants<sup>10</sup> are Somali, seems to have revived a dispute which the parties had mutually laid to rest".<sup>11</sup> It is also believed that one of the factors that led to the territorial claim by the then Biafra was the discovery of oil in that Eastern part of Nigeria. As William Zartman states: "political unrest (on territorial or border questions) broke out only when triggered by economic troubles".<sup>12</sup> All these incidents and statements therefore, confirm our standpoint, that there is a relationship between territorial sovereignty and economic self-determination. The policy of every African State regarding its territorial sovereignty is equilibrium in importance to that adopted on the question of economic self-determination. This means that for every African State, the question of maintaining its territorial integrity is as important as that of sustaining and promoting its economic independence.

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9. Continued ....

- national Relations, p.49; see also J.S. Mill, Disser-tations and Discussions, Vol.III, 1859, (London, 1859). From the Chapter on "A Few Words on Non-Intervention".
10. Most African territorial disputes erupt under the back-ground of this or that State claiming some kind of connection with the indigenous inhabitants of the territory under claim.
11. See A.O. Cukwurah, "The Organisation of African Unity and African territorial and boundary problems: 1963-1973", in I.J.I.L., Vol.13, 1973, p.1, and n.86 on p.200. See also The Daily Telegraph, Tuesday 12, August, 1980, "Zaire 'OCCUPIES BIT OF ZAMBIA', p.4, where it is reported that "The disputed area is believed to have deposits of platinum, tungsten, cobalt, copper and gold".
12. I. William Zartman, "The politics of boundaries in North and West Africa" in The Journal of Modern African Studies, Vol.3, 1965, p.160.

One of the points to be understood is that of a considerable difference which exists between territorial and boundary claims<sup>13</sup> made by States. Territorial claims concern the acquisition of sovereignty<sup>14</sup> per se over an area. Boundary claims concern the determination of the limits of a State's territorial sovereignty. In an effort to show the difference between those two terminologies, Max Huber, in the Island of Palmas case (1928)<sup>15</sup> stated the following:

Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagement entered into between interested neighbours ...<sup>16</sup>

But it must also be made clear that any boundary dispute is in fact a territorial claim, by virtue of the fact that one of the parties to such a dispute claims a portion of the other's territory. For example, the boundary disputes between Somalia and her neighbours, Ethiopia and Kenya are as much territorial disputes as the Nigerian and Biafran secessionist dispute which

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- 13. See Cukwurah, The Settlement of Boundary Disputes in International Law, p.6, loc.cit., above.
  - 14. See R.Y. Jennings, Acquisition of Territory in International Law, (Manchester, 1963); N.W. Hill, Claims to Territory in International Law and Relations, (London, 1945).
  - 15. See Reports of International Arbitral Awards, II, 1928, The Island of Palmas, (Miangas) Arbitration, United States v. The Netherlands, Tribunal of The Permanent Court of Arbitration, 1928, p.829; American Journal of International Law, Vol.22, 1928; L.C. Green, International Law Through the Cases, 2nd Edition, (London, 1959).
  - 16. See Ibid., The Island of Palmas Case (1928), in Green, op.cit., p.350; Cukwurah, "The Organisation of African Unity and African territorial and boundary problems: 1963-1973", op.cit., p.177; Briggs, The Law of Nations, loc.cit., above, p.240; A.J.I.L., Vol.22, p.687.



led the latter two countries to war.<sup>17</sup>

Another concept closely related to the African territorial problems is the doctrine of revindication.<sup>18</sup> This is a situation which obtains when a State endeavours to reclaim as its own a portion of a neighbouring country which the former deems to be its territory, which territory might have been lost in the past when the situations in both countries were different. The doctrine of revindication has been invoked on several occasions in Africa and as a result, it has brought controversies, some of which are discussed below.

The background of territorial claims, an important aspect of the problem, of these disputes is discussed below. European colonial Powers, in search of political and economic spheres of influence and domination, defined the territorial boundaries that are found in contemporary Africa. Ian Brownlie correctly observed, that "the European expansion in Africa produced a territorial division which bore little or no relation to the character and distribution of the population of

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17. See Biafra: Proclamation of the Republic of Biafra, May 30, 1967, in International Legal Materials, Vol. 6, 1967, pp. 663-668; Okeke, Controversial subjects of contemporary international law, loc.cit., above, "The Case of Biafra", pp.158-177; G.E. Akuchu, "Peaceful Settlement of Disputes: Unresolved problem for the O.A.U. (A case study of the Nigeria - Biafra - Conflict)", in Africa Today, 24, 1977, pp.39-58.
  18. See Cukwurah, "The Organisation of African Unity and African Territorial and Boundary Problems: 1963-1973", op.cir., p.177-178; S. Touval, "The Sources of Status Quo and Irredentist Politics", in C.G. Windstrand, African Boundary Problems, (Uppsala, 1969); T.G. Starke, The Acquisition of Title to Territory by Newly Emerged States, in B.Y.I.L., Vol.,41, 1965-66, p.415; Y.Z. Blum, Historic Titles in International Law, (The Hague, 1965).

the colonies and protectorates".<sup>19</sup> It follows therefore, that the international boundaries now inherited by the newly independent African States were imposed arbitrarily on them by the former European powers. When imposing these territorial boundaries, the administrative authorities did not take into account the economic and other interests of the ethnic indigenous groups. Peoples like the Shona (Manyika dialect of the Shona ethnic group) in Rhodesia and Mozambique, the Ewe in West Africa, the Masai and Makonde in East Africa, and the Somalis in the East and the Horn of Africa, had their lands intersected by arbitrary political boundaries. This obviously and consequently divided the utilisation of natural resources previously shared by these African populations.

In the case of derogation of territorial and economic sovereignty of the Shona people of Southern Rhodesia, we find that in 1888 Cecil Rhodes a "financial power in the diamond industry of South Africa and later Prime Minister of the Cape of Good Hope Colony"<sup>20</sup> obtained a "mining concession" from a local chief and thus opened the British economic sphere of influence in that country. On 11 June, 1891, an Anglo-Portuguese boundary treaty delimiting the boundary between Southern Rhodesia and Mozambique was signed. A declaration was also made by Portugal and the United Kingdom on January 7, 1895, agreeing

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19. See Brownlie, Basic Documents in African Affairs, loc.cit., above, p.360.

20. See "Mozambique - Southern Rhodesia Boundary", in International Boundary Study, No.118 - November 1, 1971, (U.S.A., Bureau of Intelligence and Research, issued by the Geographer), p.2.



to refer to arbitration a sector of the boundary in dispute under Article II of the June 1891 treaty. The dispute was commonly known as the Manica (Manyika) boundary dispute. The Manyika disputed sector is thought to have extended southwards from the parallel of 18°30' south to the confluence of the rivers Sabi and Lundi. The two governments of the U.K. and Portugal<sup>21</sup> agreed to refer to arbitration.

Since Mozambique or Zimbabwe (then Southern Rhodesia) may be in a position to turn to the doctrine of revindication, we might well expect yet another territorial dispute to come now that both those two countries have attained their political independence. Such a dispute, if it arises, will certainly be considered with regard to the economic advantages to be gained by either of the two newly independent African States. Political and other considerations can only be used as a pretext to acquire the disputed territory.

Another sphere of economic influence was created by the British Government in some of the East African territories in the 19th Century. In 1887 the British East African Association (an Association with economic interests) obtained a concession from the Sultan of Zanzibar. This Association was, in the following year,

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21. The Arbitrator in the U.K., - Portuguese, Manyika disputed sector, was His Excellency Mr. Paul Honore Vigliani, formerly Chief President of the Court of Cassation of Florence, Minister of State, and Senator of the Kingdom of Italy, see International Boundary Study: Mozambique - Southern Rhodesia, p.2; J.H.W. Verzijl, International Law in Historical Perspective, Vol.VI, (Leyden, 1973), p.551; R.B. Lillich, International Claims: Their Adjudication by National Commissions, (N.Y., 1962).



incorporated under the royal charter as the Imperial British East African Company.

After a series of redelimitations of frontiers in the East African region, the British government created Kenya,<sup>22</sup> and the controversial boundary between Kenya and Ethiopia emerged as a result of the refutation by Ethiopia, September 29, 1947 of the Kenya-Ethiopia boundary agreement.<sup>23</sup> Under this agreement territory

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22. For the historical background see the International Boundary Study, issues concerning the shaping of boundaries Kenya, Uganda, Tanzania, Somalia and Ethiopia. These issues would deal with each country separately. See also J.H.W. Verzijl, Vol.VI.

23. In 1887 the British East African Association obtained a concession to part of the mainland territories of the Sultan of Zanzibar. The following year the association was incorporated under the royal charter as the Imperial British East African Company. During 1895 the East African Protectorate was created, under the administration of the British Crown, which included the territory between the Indian Ocean and the Rift Valley. On April 1, 1902, the Eastern Province of the Uganda Protectorate was transferred to the East African Protectorate by the British Foreign Office.

An Anglo-Ethiopian agreement of December 6, 1907, delimited a boundary between the East African Protectorate, Uganda, and the Empire of Ethiopia from the confluence of the Dawa and the Ganale-Darya (called Giuba in Somalia) to the point northwest of Lake Rudolf at 6°N. and 35°E.

On June, 1920 the East African Protectorate was reorganised. The interior became Kenya colony and the coastal strip, leased from the Sultan of Zanzibar became the protectorate of Kenya. During 1927 Jubaland or Trans-Juba (Giuba), Kenyan territory immediately west of the Giuba, was ceded by the United Kingdom to Italy, and it was incorporated into Italian Somaliland the following year. Thus the Ethiopia-Kenya-Italian Somaliland tripoint was shifted from the confluence of the Dawa and the Giuba to a point upstream on the Dawa opposite Malca Rie.

Rudolf Province was transferred from Uganda to Kenya in 1926. This action automatically made the eastern sector of the Sudan-Uganda boundary between Lake Rudolf and Zulia (mount) the Kenya-Sudan boundary.

In 1946 the British Foreign Office suggested in a note to the Ethiopian Government that a commission be established to make changes in the Ethiopian-Kenya boundary. An Anglo-Ethiopian agreement of September 29, 1947, contained a proposal for the redelimitation of much of the boundary. It was understood, however, that territorial changes would not be made until the line was demarcated. .../



was taken from Ethiopia in favour of Kenya. This is the reason why the Ethiopian Government refused to ratify the "Clifford Line" produced by the Clifford Commission which carried out the redelimitation of the boundary. The Kenya-Ethiopia territorial dispute, thanks to friendly relations existing between the two countries, was settled within the spirit and understanding of reciprocal economic and other benefits, gained by maintaining a good-neighbourly relationship. The treaty between the Empire of Ethiopia and the Republic of Kenya respecting the boundary between the two countries was signed at Mombasa on June 9, 1970.

From the above statements concerning the Kenyan-Ethiopian territorial dispute, it becomes evident that it originated in colonialism. Its implication or connotation is thus embodied in the boundary treaty and agreements some of which were rejected outright by some of the supposed parties to the agreements.

One point which is undeniable is that in one way or another, some of the pre-independence treaties and agreements concerning territories, contained economic provisions expressed in a variety of forms.

If one may take the fishing and navigation industries as an example, an Anglo-Portuguese agreement, which came into operation in 1938, made the following provisions relating to the economic rights of the

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23. Continued ....

After a series of conferences, the United Kingdom and Ethiopia agreed to a joint boundary commission with Colonel Clifford in charge. With minor changes and greater detail than the 1947 agreement, the commission completed its demarcation work from 1951-55, but the Ethiopian Government refused to ratify the Clifford Line the following year.

local population living around the border between  
Tanzania and Mozambique:

(4) Freedom of navigation in the River Rovuma, without distinction of nationality, shall be maintained in accordance with the treaties and conventions in force.

(5) In order to supply their needs the inhabitants of both banks shall have the right over the whole breadth of the river to draw water, to fish and to remove saliferous sand for the purpose of extracting salt therefrom.

(6) The local authorities shall enter whatever agreements may be necessary in order that the inhabitants on both banks may be granted such facilities as are possible with regard to hunting, fishing and collection of salt in the neighbourhood of the river, without prejudice to the existing sovereign rights and in such measures as may, in the circumstances, be permissible without inconvenience to the two administrations concerned.<sup>24</sup>

The concept of territorial- economic sovereignty has found its recent expression in various international legal instruments. But the ones that are of immediate concern for the purposes of this work, are some of the U.N. and O.A.U. instruments.

The U.N. Charter provides for the development of friendly relations among nations based on the respect of the principle of equal rights and economic self-determination. But the U.N. Charter's provisions that are related to the question of the respect of States' territorial-economic sovereignty and territorial integrity are Articles 1(3); 55; and 74. It might appear, prima facie, that the mentioned Articles do not contain or mention the words territorial sovereignty, boundary dispute or even economic independence, but it needs a

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24. See A.E. McEwen, International Boundaries of East Africa, (Oxford, 1971), p.38.



positive, objective and wider analytical interpretation to establish the link. However, perhaps a more directly relevant provision of the Charter is Article 2(4).<sup>25</sup> The U.N. law forbids States from threatening or using force in order to interfere with or abrogate the territorial sovereignty of another State, for such action would threaten or even deprive of economic independence that State whose territory is being claimed.

A much more recent international legal development is the inclusion in the Charter of Economic Rights and Duties of States, of a provision concerning territorial-economic sovereignty of States, Peoples and Nations. In the preamble of this Charter, the world community of States emphasises its desire and determination to establish and promote international relations conducive to the promotion of collective economic security for development. This has particular relevance for the developing countries. Further, it indicates that the Members of the United Nations are convinced that there is a need to develop a system of international economic relations based on respect of territorial, economic and political sovereign equality, mutual and equitable benefit and on a close inter-relationship of the interests of all States. Thus it stipulates in Chapter I of the Charter that "economic as well as political and other relations among States shall be governed, inter alia,

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25. See the U.N. Charter; J. Stone, The Legal Control of International Conflicts, (London, 1959); C.B. Macpherson, The Real World of Democracy, (Oxford, 1966); G.A. Lipsky, Law and Politics on the World Community, (Los Angeles, 1973). Article 55 applies to Human Rights, Economic Development and international co-operation. Article 74 refers to the principle of good-neighbourliness and the betterment of non-self-governing territories.

by .... principle", to name only the relevant ones:

(a) Sovereignty, territorial integrity and political independence of States; (b) Sovereign equality of all States; (c) Non-aggression; (d) Non-intervention; (f) Peaceful co-existence; (g) Equal rights and self-determination of peoples; (h) Peaceful settlement of disputes; (i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development; (l) No attempt to seek hegemony and spheres of influence; (n) International co-operation for development; (o) Free access to and from the sea for the landlocked countries within the framework of the above principles.<sup>26</sup>

With the framework of our wider context of interpretation adopted in analysing and discussing the concept of territorial and economic sovereignty, it is essential to elaborate on the legal position of the O.A.U. In fact, it may be stated here that, unlike in the field of foreign investments, where African States have shown close co-operation among themselves as regards the formulation of uniform laws to regulate such investments, on the question of State territory, African States have sometimes failed to co-operate with each other. It is only on this question of whether or not some of the territorial boundaries, or even some territories comprising a whole country, should be adjusted in favour of an existing State A or B, or perhaps in favour of an African Peoples desiring to establish their own independent new State, where individual States' views clash sharply

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26. See Chapter 1, U.N. Charter on Economic Rights and Duties of States, loc.cit. above.



at times leading African States to fight each other.<sup>27</sup>  
 This shows that co-operation among African states on the question of territorial boundaries is not of the same degree as that obtaining foreign investments.

Although the new African States have reserved attitudes concerning the validity of pre-independence treaties, colonial territorial and boundary agreements, these boundaries on the whole, are likely to survive. This conclusion finds support from the provision in the Charter of the O.A.U. and numerous other O.A.U. resolutions and declarations concerning the subject. The O.A.U. Charter solemnly commits member States, under Article:

- 2(a) to promote the unity and solidarity of the African States;
- (c) to defend their sovereignty, territorial integrity and independence; and to adhere to inter alia, the principles of:
  - 3(1) The sovereignty of all Member States;
  - (2) Non-interference in the internal affairs of States;
  - (3) Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence; and
  - (4) Peaceful settlement of disputes by negotiation, mediation, conciliation, or arbitration.

Thus 2(a) and (c) above, are included among the purposes of the O.A.U. and 3(1), (2), and (3) are some of its principles. All these provisions stipulated above, form a legal basis upon which the O.A.U. members find themselves

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27. M.A. Odesanya, "Reflections on the Pacific Settlement of Inter-State Disputes in Africa", in Papers of the Third Conference of the Nigerian Society of International Law, 19 and 20 March, 1971, pp.42-50; A.B. Akinyemi, "The O.A.U. and the Concept of Non-interference in Internal Affairs of Member States", in B.Y.I.L., Vol.46, 1972-73, pp.393-400; R. Rapapat, E. Muteba and J.J. Therattil, Small States and Territories Status and Problems, (N.Y., 1971).

committed to respect and observe the territorial and boundary rights of each other.<sup>28</sup> By so doing they put the concepts of territorial-economic sovereignty into effective operation.

Apart from the provisions in the Charter of the Organisation of African Unity dealing with the question of territorial-economic sovereignty, there are resolutions, either passed by the Heads of State and Government or by the Organisation's Council of Ministers. The very first resolution of the O.A.U. provided as follows:

The Assembly of Heads of State and Government at its first Ordinary Session, held in Cairo, U.A.R. 17-21 July 1964; "Considering that the border problems constitute a grave and permanent factor of dissension;  
 Conscious of the existence of extra-African manoeuvres aiming at dividing the African States;  
 Considering further that the borders of African States, on the day of their independence, constitute a tangible reality;  
 Recalling the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven in charge of studying the means of strengthening African Unity;  
 Recognising the imperious necessity of settling, by peaceful means and within a strictly African framework, all the disputes between African States;  
 Recalling further that all Member States have pledged, under Article 6, to scrupulously respect all principles laid down in Article 3, of the Charter of the Organisation of African Unity;  
 1. Solemnly reaffirms the strict respect of all Member States of the Organisation for the principles laid down in Article 3, paragraph 3 of the Charter of the Organisation of African Unity;  
 Solemnly declares that the Member States pledge themselves to respect the frontiers existing on their achievement of national independence.<sup>29</sup>

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28. See D.E.T. Luard, The International Regulation of Frontier Disputes, (London, 1945); K. Opoku, "African Law: existence and unity", in Oerfassung und Recht in Ubersee, Vol.9, 1976, pp.65-70; Cukwurah, "Organisation of African Unity and Territorial Disputes" op.cit.; Okoye, International Law and the New African States, loc.cit.above, "Succession to Boundary Treaties", pp.93-108.
29. See Brownlie, Basic Documents on African Affairs, loc.cit. above, pp.360-361.



This resolution is in fact aimed at the preservation of a status quo on the question of maintaining the territorial boundaries which were inherited by new African States at the time of attainment of their national independence.<sup>30</sup> Although the above resolution does not mention directly the question of territorial sovereignty as it is interconnected with that of economic independence, it does refer us to Article 3, which in paragraph 1, talks of "the sovereign equality of all Member States". In "the sovereign equality of all Member States", is no doubt the respect of State economic sovereignty. Thus the African States did tacitly link the question of territorial integrity with that of economic self-determination.

The Nigeria-Biafra<sup>31</sup> territorial problem may here be examined. One has again to put economic considerations above others. It was not a coincidence that the question of Biafra's secession from the rest of Nigeria came at a time when rumours were circulating of the discovery of oil in that Eastern region of Nigeria. Both Nigeria and Biafra were very much concerned and indeed anxious to control the oil riches. Thus the economic sovereignty of Nigeria as a whole was at stake when Biafra broke the territorial integrity of that country.

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30. See Touval, "The Sources of Status Quo and Irredentist Politics", op.cit.above.

31. For references on the Biafran Case see n.17, above in this Chapter. For general information see R.L. Watts, New Federations: Experience in the Commonwealth, (Oxford, 1966); R.R. Wilson, International Law and Contemporary Commonwealth Issues, (Durham, 1971); M.S. McDougal and F.P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, (New Haven, 1961); B. Benedict, Problems of Smaller Territories: London University Commonwealth Studies, Commonwealth Papers, 10, (London, 1967).

On the Biafra-Nigerian territorial situation, the O.A.U. adopted in 1967 a resolution in favour of the restoration of the Nigerian territorial integrity.

The text of that O.A.U. resolution was as follows:

The Assembly of Heads of State and Government meeting in its Fourth Ordinary Session, at Kinshasa, Congo, from 11 to 14 September 1967: Solemnly reaffirming their adherence to the principle of respect for the sovereignty and territorial integrity of Member States; Reiterating their condemnation of secession in any Member State; Concerned at the tragic and serious situation in Nigeria; Recognising that situation as an internal affair, the solution of which is primarily the responsibility of Nigerians themselves; Reposing their trust and confidence in the Federal Government of Nigeria; Desirous of exploring the possibilities of placing the services of the Assembly at the disposal of the Federal Government of Nigeria; Resolves to send a consultative mission of 6 Heads of State (Cameroon, Congo (Kinshasa), Ethiopia, Ghana, Liberia and Niger) to the Head of the Federal Government of Nigeria to ensure him of the Assembly's desire for the territorial integrity, unity and peace of Nigeria.<sup>32</sup>

Discussion in detail of other territorial or boundary African disputes which we consider of relevance to this chapter are conducted below in section B.

Prior to attainment of political independence most of the political parties in Africa advocated an eventual alteration of colonial boundaries. At the time it was thought that such an action would accord with the wishes of the local inhabitants, but as it later came to be realised, that adjustment of the borders existing at the time of independence would be disastrous and

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32. See Brownlie, Basic Documents on African Affairs, loc. cit. above, p.364.



would in fact make certain States disappear from the map of Africa altogether, the O.A.U. sought to take the legal position it had invoked, i.e. respect for the sovereignty and territorial integrity of each African State.

On the preservation of colonial boundaries in order to keep the African States' territories intact, the President of the Malagasy Republic made the following point at the O.A.U. First Conference of Heads of State and Government.

.... I am not aware that, when our colonisers set boundaries between territories, they too often ignored the frontiers of race, language and ethics ... I do not feel that we can question the existence of unities thus created. It is no longer possible, nor desirable, to modify the boundaries of Nations, on the pretext of racial, religious or linguistic criteria ... Indeed should we take race, or language as a criteria for setting our boundaries, a few States in Africa would be blotted out from the map.<sup>33</sup>

The Prime Minister of Ethiopia stated as follows:

It is in the interest of all Africans now to respect the frontiers drawn on the maps, whether they are good or bad, by the former colonisers ...<sup>34</sup>

The same kind of remarks were made by the President of Mali who went on to state that:

.... we must take Africa as it is, and we must renounce any territorial claims, if we do not wish to introduce what we might call black imperialism in Africa ...

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33. See McEwen, International Boundaries of East Africa, loc.cit. above p.24; R.H. Rayne, "Divided tribes: discussion of African boundary problems", in New York University Journal of International Law and Politics, Vol.2, 1969, pp.243-266; Ian Brownlie, African Boundaries: A Legal and Diplomatic Encyclopaedia, (London, 1979).
34. See McEwen, op.cit. p.24; E. Cotran, "Legal Problems Arising out of the Formation of the Somali Republic", in I.C.L.Q., Vol.12, 1963, p.1010.

African unity demands of each one of us complete respect for the legacy that we have received from the colonial system, that is to say; maintenance of the present frontiers of our respective States ... Indeed, if we take certain parts of Africa in the pre-colonial period, history teaches us that there existed a myriad of kingdoms and empires ... which today have transcended, in the case of certain states, tribal and ethnic differences to constitute a nation ... if we desire that our nations should be ethnic, speaking the same language and having the same psychology, then we shall find no single veritable nation in Africa.<sup>35</sup>

It must be emphasised here, however, that since most State economic activities are performed within the state territory, or from the point of view of economic state sovereignty, state economic activities are conducted on the legal basis of equality of states and their sovereign rights over their natural resources. This means that the remarks contained in the above cited materials, and other similar views, may be said to represent a well recognised opinion, that territorial and boundary claims can provoke economic disputes affecting the economic sovereignty of many African States of today. Hence the O.A.U. has sought to prevent or reduce the possibilities of territorial or boundary claims by means of organising and encouraging unity among the African States in the formation of sub-regional, regional or any other form of economic integration.<sup>36</sup> Thus, such an economic integration will in our view bring together economically and perhaps

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35. See McEwen, op.cit. p.24; American Journal of International Law, Vol.70, 1976, EDITORIAL COMMENTS: "African Imperialism", comments on Western Sahara case, pp.801-802.

36. On economic integration organisations, see Chapter 3 above.



politically, the African ethnic or tribal groups which have been or which feel they have been divided as a result of the colonial division imposed on Africa.

The O.A.U. has also sought to bring together the African peoples by means of settlement of their inter-State territorial and boundary disputes by peaceful means, using the present international dispute settlement machinery that exists within the O.A.U. framework.<sup>37</sup>

It may be said that the territory of a State is under its exclusive and complete sovereignty and the authority of any other State does not extend to it. In modern international law, and indeed within the O.A.U. framework, the principle of territorial sovereignty and integrity is universally recognised.

The application of this rule of modern international law that a State must respect the territorial inviolability and integrity of other States, demands a reciprocal conduct in inter-State relationships. Thus in order to avoid the infringement of the right to exercise State's economic sovereignty, the principle of territorial sovereignty must be fully observed.

Territorial boundaries between neighbouring States, which are established by treaty, or by mutual agreement between the countries, cannot be changed unilaterally, or by use or threat of force.<sup>38</sup> This can only lead to

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37. The machinery for settlement of economic disputes is discussed in Chapter 6 below; see also T.O. Elias, "The Commission of Mediation, Conciliation and Arbitration of the O.A.U.", in B.Y.I.L., Vol.40, 1964, p.336; D. Metzger, "The Settlement of International Disputes by Non-Judicial Methods", in A.J.I.L., Vol.48, 1954, p.408; L.M. Salter, "Law in Africa. Sixth World Conference on World Peace", in International Lawyer, Vol.8, 1974, p.594.

38. See territorial or boundary disputes cases discussed...../

the disruption of normal economic activities, and perhaps to the advent of war between the disputants.

It is clear that though African law asserts the legal regime governing the relationships between States regarding the question of territorial sovereignty, the same law imposes a legal constraint so far as territorial adjustment or boundary rectification is concerned. Regarding the exercise of self-determination by a People, the law only refers to exercise of that right by a People of "African territories which are still dependent": (see O.A.U. Charter Article 3, paragraph 6). This means that a People, comprising a part of the population of an independent African State, may not claim the right to self-determination, whose case was considered to be incompatible with African international law: (The Biafran problem is mentioned above).

It may safely be concluded that the international legal regime which governs the issues connected with self-determination and territorial controversies arising in African States, is that which is set in the Charter of the Organisation of African Unity. It follows, therefore, that African international law is simply prohibitive and firm on regulating African States' relations regarding

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38. Continued ....

below in this chapter. For a general discussion on territorial or boundary disputes see M.D. Donelan and M.J. Grieve, International Disputes: Cases, Histories 1945-1970, (London, 1973); S.W. Boggs, International Boundaries, (N.Y., 1940).



territorial problems; whereas in the economic spheres, positive international co-operation is required. (See discussions on various economic issues elsewhere in this thesis). One most salient point that may be attributed to the rule of African international law is that it has helped States to maintain their territorial boundaries, and thus preserve their territorial integrity and sovereignty. And it has enabled them to exercise and further promote their economic self-determination.

Section B. Exercise of State Sovereignty with respect to settlement of certain specific territorial and boundary controversies.

1. Introduction

States exercise their territorial sovereignty, in relation to settlement of territorial and boundary controversies, by entering into boundary demarcation treaties, or agreements with each other. When any territorial or boundary dispute occurs, international law requires that such controversies be settled by peaceful methods, namely: negotiation, mediation and good offices, conciliation, arbitration, the International Court of Justice, and fact-finding and commissions of inquiry. Under the O.A.U. Charter Article III(4), it is specifically stipulated that "peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration", are the methods which must be employed by African States to settle any dispute that may arise between them.<sup>39</sup> Though the law does not directly mention

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39. See Elias, "The Commission of Medication, Conciliation and Arbitration of the O.A.U.", op.cit.; Metzger, "The Settlement of International Disputes by Non-Judicial Methods", op.cit.; Brownlie, African Boundaries: A Legal and Diplomatic Encyclopaedia, loc.cit., above; ....

the settlement of territorial or boundary disputes, any type of controversy between States is required to be settled by peaceful means. The U.N. Charter (under Articles 33-38) also required that disputes between States be settled by pacific means.

As has already been stated, existing African countries' boundaries were drawn or created by former European colonial Powers, whose territorial and economic expansions created not only borders, as has been underlined by O.A.U. resolutions, but also tangible and actual problems regarding the exercise of economic and territorial sovereignty by the newly independent African States. The majority of those newly independent African countries are affected by the European territorial claims which resulted in division and distribution of African lands amongst themselves, so much so that the requirement by certain new African governments, to rectify certain territorial or boundary problems, is to a greater extent, a reasonable one. But because African international law does not permit any territorial or boundary re-adjustment, attempts by certain African governments to employ unlawful methods to acquire the claimed lands, are considered to be incompatible with the law. And indeed any re-adjustment of territories or redefining of borders is seen by many African States

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39. Continued ....

Cukwurah, "O.A.U. and Boundary Problems", op.cit., "III. The Organisation of African Unity and its Machinery for Pacific Settlement of Inter-African Disputes", pp.182-191.



as an act which would hold up economic development and revert the economies of many countries to the dark ages.

Since below we analyse only some of the territorial and boundary disputes which have occurred from the time when most African countries attained their independence, it is deemed useful to mention some territorial or boundary disputes, the details of which will not be discussed. Even this list of disputes, some of which have already been settled, will not embrace all of the disputes which have actually occurred throughout the entire African continent.

Border clashes caused by territorial or boundary disputes have taken place between - Morocco and Mauritania; Morocco-Algeria; Ghana-Togo; Dahomey-Niger; Morocco-Tunisia; Ghana- Upper Volta; Senegal-Mali; Algeria-Mauritania; Nigeria-Cameroon; Nigeria-Biafra; Kenya-Uganda; Kenya-Ethiopia; Kenya-Somalia; and Somalia-Ethiopia.

All these territorial or boundary disputes cause great disruption of the normal economic activities and functioning of a State. Bilateral and multilateral trade links are affected, inter-State industrialisation is inhibited, sub-regional and regional economic development processes are slowed down as a result of territorial or boundary disputes, even migration, and marriage, which forms part of contemporary (though traditional) way of international life, are affected by the demand by some African countries to draw back

to the so called "traditional boundaries of territorial sovereignty".

As Dennis Austin quite correctly observes:

Were Togo to join Ghana, the Ewe of the Kata-Anlo area of the former British Trust Territory, and of the former French Trust Territory would at last be united. Moreover, there are excellent economic arguments to support such a union. Togo is poor, Ghana wealthy; the Volta River scheme at Akosombo near the present border could become an industrial power centre for the whole of the Volta Valley; labour already crosses the border into Ghana (when permitted to do so), and the abolition of the frontier would almost certainly increase a useful mobility of labour in an expanding economy. Such a merger (it can also be argued) might encourage similar alignments: Ghana-Togo might be enlarged by the addition of Upper Volta and Dahomey, to become the powerful and active nucleus of a large West African Federation.<sup>40</sup>

Surely, the development and actual putting into practice of the concept of creating such large and powerful federations in Africa would bring together striving African economies so as to make the African continent a powerful one economically.

## 2. Ghana-Togo Boundary Dispute

The Ghana-Togo dispute which involves a large area of territory rather than a mere boundary disagreement between the two States, is one of the problems which are considered to be already settled.

It is over twenty years now since Ghana in 1957, attained its political independence from the United Kingdom of Great Britain and Northern Ireland. Togo,<sup>41</sup> has been independent for twenty years, since 1960, but

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40. See D. Austin, "The Uncertain Frontiers: Ghana - Togo", in Journal of Modern African Studies, Vol.1, No.2, 1963, p.141.

41. Before attainment of political independence, Togo was a trust territory, which under the "International Trusteeship System" of the United Nations (Articles 75-85, U.N., ...)



the territorial dispute inherited by them is still a matter of contention at the time of writing this thesis. One might have expected the two peoples of Ghana and Togo to realise the realities of economic and political integration which is so pressing a necessity for the whole sub-region of West Africa. More so, as these two Republics are both members of the Organisation for African Unity, and therefore are bound by its Charter to respect the territorial integrity of one another. But the evidence of boundary relations between the two countries shows that Togo still claimed those territories included in Ghana, even as late as 1976. On the 11th February, 1976, in a letter to The Times (London), Mr. Asante, the Ghana High Commissioner to the U.K., stated that:

It is regrettable that contrary to the Organisation of African Unity Charter of which all independent States in Africa are signatories, any country should today seek to redraw her boundaries. But this is what portions of the advertisement which appeared in The Times of January 13, 1976, presumably by or on behalf of the Government of the Republic of Togo unashamedly advocate. The advertisement asked the Head of State of Ghana, Colonel I.K. Acheampong, to "restore Togo as she was before the Europeans got to work", in obvious reference to those areas of Ghana which were formerly under United Kingdom trusteeship but which merged with Ghana following the popular expression of the will of the inhabitants of the area.<sup>42</sup>

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41. Continued .....

Charter) was administered and supervised by the United Nations until it gained its independence in 1960. It was on the basis of Article 76 which stipulates the basic objectives of the trusteeship system that in 1956 the U.N. organised a plebiscite that created the disrupted territorial boundary between Togo and Ghana.

42. See The Times, Wednesday, January 11, 1976; For Treaty relationship between the countries see Ghana - Togo: Border Agreement, 5 September, 1966, in International Legal Materials, Vol.5, 1966, p.859; Ghana-Upper Volta: Border Treaty, in West Africa, April, 1977.

When Ghana became independent in 1957, the unification of British Togoland with the Gold Coast had taken place through a plebiscite organised in May 1956 by the United Nations with perhaps the co-operation of the United Kingdom. The plebiscite, which unfortunately grouped together certain tribes found in both Togo and Ghana, cut through some of these tribes and as a result produced a border that followed tribal lines for 170 of its 489 miles. The plebiscite placed such tribes as the Kusasi, Mamprusi, Dagomba, Busanga, and Nchumburu totally within Ghana. But it left more than 100,000 Ewes along with other small tribal groups of Bmobas, Konkombas, and Ntribus and others, split between the two Republics. The border between these two countries totally divides African tribal peoples in the area.

Ironically, however, following the defeat of the Germans during the First World War, when Germany lost most of her African colonies including that of Togoland, Western Togoland was made a League of Nations mandate under British administration and Eastern Togoland became a French mandate. So when Togoland was divided into two parts, one French and one British, the boundary that formerly existed between the British colony of the Gold Coast and the German Togoland, (with minor modifications or changes of the border points between Germany and the U.K. before the plebiscite in Ghana in 1956) shifted to the boundary border points dividing the former German Togoland into the two trustee lands between France and the U.K. Thus from the date when the German Togoland



became a mandate territory, the African peoples who live in Togo (formerly French Togoland Trust Territory) found themselves cut off from the rest of the peoples with whom they had shared the territory of German Togoland.<sup>43</sup>

We find here that the decision of the League of Nations to divide the former German territory into two parts, giving one part to the British and the other to the French, created a territorial problem which, even if the United Nations had not come on the scene to allow the further creation of two separate independent States, if the Togos had been allowed to emerge as separate States, the problem of territorial disputes between the States created in this manner would inevitably have arisen, with the African tribes in both territories either demanding to be united as within the framework of the former German Togoland or even wanting further disintegration by joining the other newly formed States, namely, Ghana, Upper Volta, Benin (formerly Dahomey).

This means that territorial sovereignty and integrity which the O.A.U. has advocated would still have been difficult to achieve unless perhaps the former German Togoland had maintained its independence. However, such a hypothetical concept would have been very difficult to put into practice since the evidence of a plebiscite shows that the British Togoland peoples decided to join Ghana shortly before independence. These people had every right to refuse such unity with

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43. For historical information on both the boundary treaties and the African populations or tribes who inhabited the disputed area during and after the colonial era, see International Boundary Study, Volumes on Ghana - Togo boundary formations; Austin, op.cit.; Zartman, "Politics of Boundaries in North and West Africa", op.cit.

their fellow Africans (the people of the Gold Coast) knowing that the French Togoland was going to gain its political independence in the near future (1960). But they chose instead to become independent within the framework of Ghana, so that they could gain the economic benefits which such independence brought with it.

The Togo-Ghana problem is a territorial claim by the Republic of Togo of territory from Ghana on the basis of the following arguments:

1. Theoretically, Togo refuses to uphold the decision of the League of Nations to divide the former German colony into two Togos;
2. Togo also does not seem to uphold the decision of the United Nations to supervise a plebiscite which resulted in the division of the Ewes.
3. Togo argues that the Ewes and others who live in that part of Ghana, formerly the British Togoland, should be reunited with the present independent Republic of Togo. Thus the argument here is that the tribal peoples who have the tribal connection with peoples of present day Togo should be given to Togo.
4. Togo does not claim the Ewes and others only, but the land, territory on which they live, which is presently under the territorial sovereignty of Ghana.

As the Government in Togo is endeavouring to recover the territory lost during the colonial era, the Government in Ghana is determined not to part with even an inch of that territory. The argument put forward by Ghana is that the issue was settled by a competent body (the United Nations) following the free expression of the intentions and aspirations of the people concerned, and, as far as the Government of Ghana is aware, has been irrevocably settled and cannot be re-opened. Apart from basing their argument on the competence of the United Nations we see also that the Ghana government



strongly emphasises the use of the rules contained in the Charter of the Organisation of African Unity.

However, it is observed that the border treaty relationship between the disputants has not completely resolved the problems concerning territorial issues. This means that apart from the plebiscite held by the United Nations, and upholding of the rules of the O.A.U. and the general rules of international law, the disputants have not been able to reach a permanent agreement. But in order to show the treaty provision development relating to this case, it is necessary to name some of the basic background legal instruments forming the fundamental documents concerning the Ghana-Togo territorial dispute.<sup>44</sup>

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<sup>44</sup>. See International Boundary Study, No.126 - September 6, 1972. Ghana-Togo Boundary, (published by the U.S.A., Department of State Bureau of Intelligence and Research, Issued by Geographer):

1. Joint Recommendations of the British and German Commissioners, with regard to the future Limits of British and German Protectorates and Spheres of Influence in the Territories lying in the Interior of the Gold Coast Colony and the German Togo Protectorate, December, 1887, see Edward Hertselt, The Map of Africa by Treaty, Vol.3, (London, 1909) pp.809.
2. Agreement between Great Britain and Germany, respecting Zanzibar, Heligoland, and the Spheres of Influence of the two Countries in Africa. Signed at Berlin, July 1, 1890, British and Foreign State Papers (BFSP), Vol.82, (1889-90), pp.35-47.
3. Convention and Declaration between Great Britain and Germany, for the Settlement of the Samoan and other Questions (West Africa; Zanzibar, etc.). Signed at London, November 14, 1899, BFSP, Vol.91, (1898-9).
4. Convention between Great Britain and Germany respecting the Boundary between the Gold Coast and Togoland. Signed at Berlin, September 26, and at London, December 2, 1901, BFSP, Vol.99, (1905-6), pp.360-3.
5. Notes exchanged between Great Britain and Germany defining the Boundary between the Gold Coast and Togoland to the North of the 9th degree of North Latitude. Berlin, June 25, 1904, BFSP, Vol.99, (1905-6), pp.363-5.
6. Mandate for the Administration of part of the ...../



3. Morocco<sup>45</sup> and Mauritania territorial claim over Western Sahara

It has already been shown that under contemporary international law all peoples and nations have the right to self-determination. This means that as a non-independent territory, Western Sahara would have acquired independence status in 1975 had Spain as the administrative authority not connived with Morocco and Mauritania in concluding a Tripartite agreement between Morocco and Mauritania (detailed discussion undertaken elsewhere in this subsection). The acquisition of Western Sahara by Morocco and Mauritania constitutes not only a breach of international law in general, but is also a diversion by

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44. Continued ....

former German Territory of Togoland, Conferred upon His Britannic Majesty, confirmed and defined by the Council of the League of Nations. London, July 20, 1922, BFSP, Vol.116, (1922), pp.824-31, also in Great Britain Cmd. 1794, (1923).

7. Mandate for the Administration of Part of the former German Territory of Togoland conferred upon the Government of the French Republic, confirmed and defined by the Council of the League of Nations. London, July 20, 1922, BFSP, Vol.118, (1923), pp.890-6.
  8. Final Report of the Commissioners appointed to delimitate the Boundary between the British and French Mandated Territories of Togoland, with Protocol, Lomé, October 21, 1929, BFSP, Vol.132, Part 1, (1930), pp.241-63; Great Britain Treaty Series, France No.1, (1930) Cmd. 3611.
  9. Exchange of Notes between the United Kingdom and France regarding the Boundary between the British and French Mandated Territories of Togoland, London, January 30 - August 19, 1930, BFSP, Vol.132, (1930), pp.239-40; Great Britain Treaty Series, No.45 (1930), Cmd. 3713, (with map).
45. See A.S. Reyner, "Morocco's International Boundaries: A Factual Background", in Journal of Modern African Studies, Vol.1, 1963, p.318.



those two States from African international law. It is shown in the discussion below that the People of Western Sahara have been deprived of their right to exercise self-determination. Consequently they have been deprived of the right to exercise their economic sovereignty.

It may be emphasised here that the economic nature of territorial disputes may be characterised by the conduct of trade (either by the State or by private individuals and groups) and movement of money and goods across the national frontiers, and the right of States and peoples to control exploitation of their natural resources. The other characteristic is that of the desire of States to have access to and acquisition of natural and human resources. The economic interests, unmentioned by both Morocco and Mauritania, connected with their territorial claims over the Western Sahara are expressed inter alia by the establishment of "the Mauritania-Morocco co-operation Agency (AMAMCO)",<sup>46</sup> in 1975. Its first Constituent General Assembly was held at Rabat, Morocco, on 21 February the same year. The objective of the AMAMCO is to develop the entire economic, technical, scientific and cultural relationship between the two member countries.

It has been observed that the recently established body is a new instrument for furthering the growing political and economic co-operation between the two States. The beginning of this recent promotion of economic co-operation between Morocco and Mauritania

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46. See U.N. Economic Commission for Africa, "Directory of Inter-Governmental Co-operation Organisations in Africa", (E/CN/14/CEC/1/Rev.2), (Addis Ababa, 1976), p.29.

may be said to be connected with the territorial interests of the two States over the Western Sahara, though the claims over parts of the Spanish Sahara (Western Sahara) by both Morocco and Mauritania can be traced to the time when these two States gained their political independence. In the case of Morocco, the Western Sahara territorial claim is well documented within Government and other circles from 1956 onwards when the country attained independence. But apparently, as Morocco found that Mauritania would not give away even an inch of its territory, it decided to abandon its territorial claims<sup>47</sup> in Mauritania and embarked instead, on promoting a policy of co-operation between the two countries. As will be seen below, this co-operation has manifested itself, when the two countries having laid their claims to the territory of Western Sahara, managed to acquire between them that country's territorial sovereignty.

In order to understand the Morocco/Mauritania territorial claims over Western Sahara, it is essential

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47. "Morocco long opposed the independence of Mauritania. In the historic debate on Resolution 1514 (XV) Morocco accused the French of attempting "to partition Morocco and disrupt its national territorial unity, by setting up an artificial State in the area of Southern Morocco which the colonialists call Mauritania. The population of that area does not even know the word 'Mauritania'. If you tell a Bedouin of so-called Mauritania that you are in Mauritania, he will not understand what you are talking about"; see Thomas M. Franck, "The Stealing of the Sahara", in American Journal of International Law, Vol.70, 1976, pp.694-5, n.5. Morocco has also made territorial claims to certain parts of Algeria, see P. Wild, "The O.A.U. and the Algerian-Moroccan Border Conflict: Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes among African States", in International Organisation Vol.18, 1966, p.20; Cukwurah, "O.A.U. and Boundary Problems", op.cit., "Algeria - Morocco Boundary Dispute" pp.185-191; Hill, Claims to territory in International Law, loc.cit. above.



to be familiar with a brief outline of the boundary position of Western Sahara and her neighbouring countries. Reference to the series of International Boundary Study is considered very useful since the study gives a historical background, which includes all the boundary treaties concluded during the colonial period. Western Sahara boundary treaties which concern us are those which define its territorial borders with Morocco, Mauritania and Algeria, since these are the three countries bordering Western Sahara.

According to treaties concerning the boundary between Morocco and Western Sahara (Spanish Sahara):

The Morocco-Spanish Sahara boundary is the parallel of 27°40' North between the Atlantic Ocean and the Meridian of 8°40' West of Greenwich. International agreements relative to the boundary are Article VI of the Franco-Spanish Treaty of October 3, 1904, Articles I and II of the Franco-Spanish Treaty of November 27, 1912, and the acceptance of international treaties relating to Morocco by Article II of the Franco-Morocco Accord of May 28, 1956.<sup>48</sup>

It is evident therefore that Morocco and Western Sahara have shared a common boundary recognised even by Morocco itself from the time it attained political independence on March 2, 1956. This however, suggests that the two countries did not share a common territory before Morocco gained its independence.

It must be made clear that it is not boundary démarcation which is under dispute in the Western Sahara-Morocco case, but rather Morocco's territorial claims which are at the heart of the dispute. Representatives of the Government of Morocco have made territorial and

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48. See International Boundary Study: Morocco-Western Sahara, No.9, September 14, 1961. See also International Boundary Study for the historical treaty background in relation to all boundary treaties ...../

sovereign claims southwards as far as the Senegal River. These claims include all of Western Sahara, all or most of Mauritania, part of Mali, and part of Western Algeria. This shows that Morocco has not only territorial claims over Western Sahara, but also over those other countries mentioned.

There are also treaties and other international agreements relating to demarcation of the border between Mauritania and Western Sahara. Like in many other cases some of these treaties date from the colonial period. But the most recent boundary demarcation treaty was signed in 1956:

After the signing of a Franco-Spanish delimitation agreement on December 19, 1956, a joint commission the following year demarcated the Mauritania-Spanish Sahara boundary with pillars numbered from south to north ....<sup>49</sup>

According to the information contained in those treaties<sup>50</sup> relating to the border between Mauritania and Western Sahara, it is therefore apparent that the two countries have maintained their territorial identities separately as sovereign entities. This means that the two countries have existed as separate entities, well before and during their colonisation. It therefore follows that the

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48. Continued ....

concluded by the administrative and interested Powers during the colonial period.

49. See International Boundary Study: No. 149 Mauritania-Spanish Sahara, pp. 2-3.

50. See For the historical background of boundary treaties concerning the Western Sahara-Mauritania boundary, see also International Boundary Study.



question as raised by Mauritania in the U.N. General Assembly and at the International Court of Justice (the position of Mauritania is analysed in the section below) that it has "legal ties" with Western Sahara has been proved right but still both the U.N. General Assembly and the International Court of Justice maintained that those legal ties did not alter the territorial sovereignty and integrity of Western Sahara.

The Algerian-Western Sahara boundary follows the meridian of 8°40' West between the tripoints of Mauritania at about 27°18'40' North and of Morocco at 27°40' North. The meridian established by the Franco-Spanish convention of 1904 as a line separating French and Spanish spheres of influence was as follows:

Article V - "In order to complete the delimitation set out in Article I of the convention of the 27th June, 1900, it is understood that the line of demarcation between the French and Spanish spheres of influence shall start from the intersection of the meridian 14°20' West of Paris (12° West Greenwich) with the 26th degree of north latitude, which it shall follow in an easterly direction as far as its intersection with the 11th meridian west of Paris (8°40' W. Greenwich). The Line shall follow this meridian as far as the Wad Draa (Oued Draa), the 10th meridian west of Paris (7°40' W. Greenwich), and lastly the 10th meridian west of Paris as far as the watershed between the basins of the Wad Draa and the Wad Sus, then between the basins bordering the Wad Mesa (Oued Mesa) and the Wad Noun (Oued Noun) as far as the nearest point to the source of the Wad Tazerault (Oued Tazeroualt).<sup>51</sup>

This Algerian-Western Sahara boundary<sup>52</sup> which has two pillars was demarcated by a mixed Franco-Spanish Commission

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51. See International Boundary Study, No.84 (Revised) July 1, 1970, Algeria-Spanish Sahara Boundary, pp.2-3.

52. See Ibid., p.4: Treaties and agreements relating to the Algerian-Western Sahara boundary:

1. Treaty of Peace and Amity, between Spain and ...../

in 1956-58.

As Spain was implementing the process of decolonisation, which consequently meant abandoning its territorial sovereignty and rule over its former colony of Spanish Sahara, Morocco and Mauritania moved in to secure their long claimed territorial legal rights and sovereignty.

Under a Tripartite Declaration of Principles concluded on the 14th November 1975, between Spain, Morocco and Mauritania, a tripartite administration for Western Sahara was established. This agreement, which is discussed more fully below, was entered into

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52. Continued ....

- Morocco, Tetuan, April 26, 1860. (Ratifications exchanged at Tetuan, May 26, 1860). British Foreign and State Papers (BFSP), Vol.51, (1860-1), pp.928-33.
2. Spanish Notification of the Extension of Spanish protection over certain territories on the North-west coast of Africa. London, January 9, 1885. (Received by Earl Granville, January 12, 1885), Edward Hertslet, The Map of Africa by Treaty, 3 Vols. 3rd Edition, (London, Harrison and Sons, 1909, Vol.3, pp.1162-4.
3. Convention between France and Spain for the Delimitation of their Possessions in West Africa. Paris, June 27, 1900. (Ratification exchanged at Paris, March 22, 1901). Ibid., Vol.3, pp.1165-7.
4. Convention between France and Spain respecting Morocco. Paris, October 3, 1904. BFSP, Vol.102, (1908-9), pp.432-5.
5. Traite entre la France et le Maroc pour l'Ettablissement d'un Regime regulier et l'Introduction des Reformes necessaires. Fez, March 30, 1912, BFSP, Vol.106, (1913), pp.1023-4.
6. Treaty between France and Spain regarding Morocco. November 27, 1912, Supplement to the American Journal of International Law, Official Documents, Vol.7, (1913), pp.81-93.
7. France-Morocco Joint Declaration. Paris, March 2, 1956, in American Journal of International Law, Vol.51, pp.676-683.



after almost one year, when on the 13th December, 1974, the U.N. General Assembly adopted a resolution requesting the International Court of Justice to give an advisory opinion on the following questions:

1. Was Western Sahara (Rio de Oro and Sakiet el Harma) at the time of colonisation by Spain a territory belonging to no one (terra nullius)? If the answer to the first question is in the negative,
2. What are the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?<sup>53</sup>

The Court addressing itself to the above-noted questions declared its clarification of the concept of "terra nullius" which was to be defined prior to attempting to find the answers to the questions before it. It was important to define the concept of terra nullius in order to determine whether the Western Sahara territory was no man's land, or whether it belonged to Morocco, Mauritania, or some other people at the time of colonisation by Spain. The Court indicated that a territory - peoples by tribes - as was the Spanish Sahara (Western Sahara), could not be treated as terra nullius at the time of colonisation by Spain. This was so because there was significant evidence showing that at the time in question, Western Sahara was inhabited by the indigenous Sahrawi population.<sup>54</sup>

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53. See I.C.J. Reports 1975, Western Sahara, Order of 3 January, 1975, "Request for Advisory Opinion", p.3.

54. See Franck, "The Stealing of the Sahara", op.cit., pp. 696-697; International Court of Justice, Communique No.75/10, 16 October, 1975, (The Hague, 1975), "For the purpose of the Advisory Opinion, the 'time of colonisation by Spain' may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro. It is therefore by reference to the law in force at that period that the legal concept of terra nullius must be interpreted. In law, 'occupation' was a means of peaceably acquiring...../

On the meaning of "legal ties" claimed by both Morocco and Mauritania, the International Court considered that Morocco's claim to sovereignty through immemorial possession rested mainly on the special structure of the Sherifian State, evidence said to indicate internal display and international recognition of Moroccan sovereignty was significant in the "Wad Noun Shipwreck clause" of the Anglo-Moroccan Agreement of 13 March 1895, and Franco-German exchange of letters of 4 November, 1911. The "Wad Noun clause" as used by Morocco was to mean that other sovereign States, especially European Powers who recognised the territorial sovereignty of Morocco over Morocco proper, were deemed by Morocco to have recognised Moroccan territorial sovereignty over certain parts of territories adjacent to it. This was the case with the Western Sahara where Morocco claimed to have had territorial sovereignty or influence, as it is claimed, in the territory of Sakiet El Hamra. Such territorial sovereignty is said by Morocco to have covered the geographical areas

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54. Continued .....

sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid 'occupation' that the territory should be terra nullius. According to the State practice at that period, territories inhabited by tribes or peoples having a social and political organisation were not regarded as terrae nullius; In their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows (a) that at the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them; (b) that Spain did not proceed upon the basis that it was establishing its sovereignty over terrae nullius: thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes", p.5.



from Wad Noun country to Sakiet El Hamra. The "Wad Noun clause" as claimed by Morocco to have been used, is said to have been included in agreements and treaties concluded between Morocco and other foreign Powers (especially Europeans).

The International Court of Justice concluded that the territory or country of Wad Noun was separate from that of Sakiet El Hamra in Western Sahara. But the Court pointed out that in the light of materials and information presented to it, there is evidence of the existence, at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living on the territory of Western Sahara. The Court considered:

as an example of legal ties, the influence enjoyed by the Sultan of Morocco over the Western Sahara people, e.g. when in 1863, a Spanish ship was wrecked at a place about 180 miles to the south of Cape Noun, Western Sahara indigenous people held the sailors and the ship, who were only to be released after successful negotiations had been conducted by the Sultan of Morocco.

The Court added that these materials and information:

..... equally show the existence of rights, including some rights relating to the land, which constituted legal ties between Mauritania and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any ties of territorial sovereignty between the Kingdom of Morocco or the Mauritanian entity.<sup>55</sup>

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55. See I.C.J. Reports 1975, "Advisory Opinion Concerning certain questions relating to Western Sahara (Rio de Oro and Sakiet El Hamra)", 16 October, 1975, p.60. Full text of this Advisory Opinion is reproduced in International Legal Materials, Vol.14, 1975, pp.1355-1408.

Thus the Court found no legal ties of such a nature that they would affect the application of Resolution 1514 (XV) on the decolonisation of Western Sahara and, in particular, the implementation of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory.

The International Court of Justice regarding Question 1 unanimously reached the Opinion that: "Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain was not a territory belonging to no-one (terra nullius)."<sup>56</sup>

With regard to Question 2, by 14 votes to 2, the Court's Opinion was "that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in paragraph 162 of ..."<sup>57</sup> the Opinion. The Court also reached the Opinion by 15 votes to 1, that "there were legal ties between this territory and the Mauritanian entity of the kinds ..."<sup>58</sup> also indicated in paragraph 162 of the Opinion.

Even after having seen that the International Court of Justice had given an Opinion which did not support their claims, Morocco and Mauritania did not abandon their claims to the territory of Western Sahara. Debates continued in the U.N. General Assembly as well as within the Governments of the interested States,

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56. See I.C.J. Reports 1975, Western Sahara Advisory Opinion, p.60.

57. See Ibid., p.60.

58. See Ibid., p.60.



including Morocco and Mauritania.

The United Nations Secretary-General, Kurt Waldheim, reported to the Security Council on November 19, 1975 that Spain had informed him that it had agreed with Morocco and Mauritania on a declaration of principles according to which Spain would terminate its presence in Western Sahara by February 1976 at the latest. The Tripartite Agreement (Declaration) which was signed in Madrid on 14 November, provided for the establishment in Western Sahara, of a tripartite administration to which Spain would transfer all the powers and responsibilities it exercised as administering Power.

It was decided by these three parties that the new administration which was to consist of Spain, Morocco and Mauritania, would work in collaboration with the Djema's (Western Saharan Parliament) which would represent the view of the Western Saharan population.

The Tripartite decision to administer Western Sahara in the manner described above met with resistance from other parties concerned with the question of decolonisation of the territory, namely: the United Nations and Algeria. Algeria, which shares a common boundary with Western Sahara and which to some extent supports the Western Saharan political liberation movements, condemned the decision as one which deprives the Western Saharan population of the right to self-determination. Algeria took the position that the Declaration was contrary to the relevant Security

Council Resolutions and was therefore null and void.

The position of the United Nations as stated by the Secretary-General in his report was that, "since the declaration dealt with decolonisation of the Territory, it was appropriate that the General Assembly should express itself on that subject".<sup>59</sup>

The United Nations did not seem to agree with the way Spain was handling this vital question of self-determination of the Western Saharan people. In particular, the U.N. found that the Tripartite Declaration of Principles could not suffice on the vital question of the transfer of power to the Western Saharan people through a popular expression of the will of the people living in that territory.

In the light of the General Assembly resolutions 3458 A (XXX) and 3458 B (XXX) on decolonisation of the Western Sahara, the Secretary-General, upon receiving on the morning of the 26 February, 1976 a letter from the Permanent Representative of Spain at the U.N. announcing the withdrawal of the Spanish administration from the Western Sahara as from that day, told a press conference that Spain must take "... immediately all necessary measures in consultation with all the parties concerned and interested, so that all Saharans ... may express fully and freely, under United Nations supervision, their inalienable right to self-determination".<sup>60</sup>

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59. See United Nations Monthly Chronicle, Vol.XII, No.2, December, 1975, "Tripartite Agreement Reached on Western Sahara, Security Council Informed", pp.8-9; I.C.J. Pleadings 1975, Western Sahara Case, "Tripartite Agreement".

60. See U.N. Monthly Chronicle, Vol.XII, No.3, 1976, "U.N. Turns down request to be represented at Western Sahara Assembly Session - Secretary-General's Press Conference", p.41.



The position of the United Nations was that under its supervision, the application of resolution 1514 (XV) on decolonisation, was to be organised through a referendum or through the simple transfer of power to the people of Western Sahara.

The Spanish Government which collaborated with the Governments in Morocco and Mauritania, to transfer to those two countries the territory of Western Sahara, failed to take such measures that would have avoided the territory being taken by Morocco and Mauritania as later happened. Instead the Spanish Government informed the Secretary-General of the United Nations that Spain would terminate its sovereignty over the territory and thereafter it did nothing to prevent the other parties in the Tripartite Agreement from taking effective control over the territory as soon as Spain withdrew. On the 25 February, just a day before Spain withdrew from Western Sahara, it sent a memorandum to the U.N. Secretary-General informing him of its intention to withdraw from the territory. The memorandum read:

The Spanish Government, in accordance with paragraph 2 of the Declaration of Principles signed in Madrid 14 November 1975, in which it was decided that the Spanish presence in the Territory of Western Sahara would be definitely terminated by 28 February 1976 at the latest, has decided that it will definitely terminate its presence in the Territory tomorrow, 26 February. I shall transmit to you in due course the appropriate communication informing you of the termination of the Spanish presence in Western Sahara.

In this connection, a meeting of the DJema'a has been convened at which the present Spanish Governor, who is acting as a member of the Tripartite Administration, will inform the DJema'a of this decision of the Spanish Government.

This meeting does not constitute the popular consultation provided for in the Madrid Agreement of 14 November 1975 and in General Assembly Resolution 3458 B (XXX), unless the necessary conditions are met, including in particular the presence of a representative of the United Nations appointed by you in accordance with paragraph 4 of the above-mentioned resolution.

My Government is today transmitting to the Governments of Morocco and Mauritania the above information concerning the purpose of the meeting of the Djema's".<sup>61</sup>

Analysis of this memorandum which was sent to the Secretary-General leaves one in no doubt that Spain, at that particular time being still the administering Power and a member of the Tripartite Administration, was quite aware of the decision to convene the Djema's. But Spain informed the Secretary-General that she was not aware of the Djema's extraordinary meeting.

The objective of the United Nations and indeed the requirement, in the light of present-day international law that the people of Western Sahara should have exercised their inalienable right to self-determination through free consultation organised with the assistance of a representative of the United Nations appointed by the Secretary-General (General Assembly Resolution 3458 B (XXX)), was not met. Though the Spanish position<sup>62</sup> was

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61. See "U.N. Turns down request to be represented at Western Sahara Assembly Session", op.cit., pp.41-42.

62. "The question of the Spanish Sahara has been exhaustively discussed in the Special Committee of the General Assembly since September, 1963 and in General Assembly plenary sessions since December of that year. The first of a stream of resolutions calling on Spain to implement the Sahara's right to self-determination was passed in Committee on October 16, 1964; the General Assembly followed suit one year later. Madrid's position, during this period, was that its African territories as provinces of metropolitan Spain, were not subject to self-determination", see Franck, "The Stealing of the Sahara", op.cit., p.701.



stated as one which essentially did not consider the meeting of the Djema's as the expression of popular will and consultation with the people of Western Sahara, and therefore although the necessary conditions were not fulfilled (according apparently to the Madrid Tripartite Declaration of Principles and also according to the U.N. resolutions), Spain nevertheless, pointed out that from that day of the 26 February 1976, it "does not feel responsible for Western Sahara, but it maintains its adherence to the Madrid Agreement". Thus it maintained its position of transferring the territorial and political sovereignty (and consequently economic sovereignty) to the Governments of Morocco and Mauritania (the other parties to the Madrid Tripartite Agreement). It may be stressed here that at the time of writing this study, the whole territory of Western Sahara<sup>63</sup> is under the effective control of Morocco and Mauritania, after having been divided and shared between the two States according to their claims.

It may be mentioned here that in West Africa, as well as in other areas of the Continent, other territorial and boundary disputes have been settled. This is often done through an understanding of the historical, political, social, economic and other considerations. But the majority of African countries have sought to put much emphasis on the need for economic integration, which

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63. See Malcolm Shaw, "The Western Sahara Case", in The British Year Book of International Law, 1978, (Oxford, 1979), pp.118-154.

it is reasonably believed will lead Africa to political unity. And thus eventually it is believed Africa will rid itself of the territorial and boundary disputes presently either on the shelf or currently being discussed.

The settled territorial and boundary disputes in West and North Africa, to name just a few are: Mali-Mauritania; Liberia-Guinea; Morocco-Mauritania; Algeria-Morocco; Benin (Dahomey)-Niger; and Nigeria-Cameroon.<sup>64</sup> But even with some of the above so-called settled problems, one cannot state with certainty that they have been permanently resolved, for as history shows, at certain times these border disputes are revived. For example, the Nigerian Daily Times of November 10, 1976, published an article entitled "Nigeria - Cameroon border dispute". Another article entitled "Nigeria, Cameroon Meet Soon on Borders" appears in the Daily Times of Monday November 8, 1976. Apparently these articles are concerned with the alleged complaints of Nigerian fishermen who are said to have been meeting harassment from the Cameroonian gendarmes at the ill-defined border between the Nigerian Cross River State and Cameroon. According to the above-mentioned article of November 10, 1976:

These unfortunate border clashes are not new. One of the major reasons for setting up a Joint Nigerian-Cameroon permanent consultative commission in 1971, was to prevent the occurrence of border clashes between the nationals of the two

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64. See Cmnd. 1567, U.K.-Nigeria: Exchange of Letters, incorporation of the Northern Cameroons into the Federal Republic of Nigeria; I.C.J. Reports 1962, "Case concerning the Northern Cameroons (Cameroons v. U.K.)", Judgement of December 1963"; I.C.J. Pleadings 1963, "Case concerning the Northern Cameroons 1963, (Cameroons v. U.K.)"; D.H.N. Johnson, "The case ...../



countries. When President Ahidjo of the Cameroon Republic paid an official visit to this country in March 1972, the thorny problem came up for discussion. The matter was not satisfactorily disposed of and so the Nigerian authorities again discussed the border issue with President Ahidjo in Kano in September 1975.

The Maroua declaration, later agreed to between the two countries, sought to clarify the border dispute by providing a two-kilometre corridor on either line dividing the territorial waters of the two countries and sought generally to improve relations between them.<sup>65</sup>

The Article goes on to say that regrettably, the spirit of the Maroua declaration was not strictly adhered to on the Cameroonian side. The reasons mentioned being those of incidents involving the activities of Cameroonian gendarmes across the Nigerian frontiers in the areas of the Cross River State.

The New Nigerian of Thursday, 27 May, 1976 reports on its Editorial page that "Nigeria-Chad relations" were quiet in Gubl, an island in Lake Chad. Due to border clashes between the Chadian gendarmes and Nigerian Mobile Police on the island's border, Nigeria and Chad worked out a peace formula for towns along their borders.

The two countries created a Lake Chad Joint Committee and set up a joint central post in the Lake Chad area. The formula was the result of a meeting between the Head Of State of Nigeria, Lt.General Olusegun Obasanjo and his Chadian counterpart, General Felix Malloum.

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64. Continued ....  
concerning the Northern Cameroons", in I.C.L.Q.,  
Vol.13, 1964, pp.1143-1192.

65. See Daily Times (Nigeria), Wednesday November 10, 1976, p.3; I.C.J. Pleadings 1976, "Case concerning the Spanish Sahara, 1974-75".

In a communique issued at the end of their meeting held in Maiduguri (Nigeria) the two leaders endorsed recommendations made earlier by delegates who had met in Borno State capital for preparatory work. The two Heads of State considered the role that could be played by a mixed commission in promotion of a friendly relationship and co-operation between their two countries. The communique reaffirmed the unflinching support of the two countries for the Lake Chad Basin Commission, which offers the member States the opportunity for co-operation on matters of mutual interest.

As regards the territorial or boundary disputes which have occurred in the East African sub-region, the following disputes are discussed below: Somalia-Kenya boundary dispute; Somalia-Ethiopia territorial dispute; and Uganda-Kenya territorial claim.

#### 4. Somalia-Kenya<sup>66</sup> boundary controversy

The position that has been adopted by Kenya regarding this dispute is one of adherence to the O.A.U. Charter's enshrined principle of territorial integrity. Kenya feels that if she were to give away her entire northern province which is inhabited by more than 240,000 Somali, a minority ethnic group, such a precedent would encourage other minority groups living in Kenya to claim territorial secession, and this would result in the destruction of Kenya as a nation. If its minority ethnic

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66. See Cukwurah, "OAU and Boundary Problems", op.cit., "The Ethiopia-Somali-Kenya Dispute", pp.193-201; O.A.U. Declaration on Kenya-Somali relations adopted September 1967, in I.L.M., Vol.6, 1967, p.1242; Hoskyns, op.cit. Case 2, "The Ethiopia-Somali-Kenya Dispute, 1960-1967".



groups were allowed to secede, Kenya would disappear from the map of Africa altogether. As we shall see below, Uganda which claims part of Kenya territory, would also take almost the entire province adjacent to its border with Kenya. Tanzania may also claim that the minority ethnic group, the Massai, living in Kenya should join the other Massai ethnic peoples in Tanzania. Such territorial claims by Tanzania, should Tanzania act like Somalia, would surely leave no territory remaining for Kenya.

On the other hand, the basic position of the Somali Republic is not to accept the validity of pre-independence boundary arrangements; it claims all territories of the neighbouring countries where there may be a Somali ethnic group living. All Somali governments right from the time it attained political independence (1960), have pursued a policy of reunification of all the Somali ethnic groups into a Greater Somaliland. The Somali Republic states that it "shall promote, by legal and peaceful means, the union of Somali territories ..."<sup>67</sup> But as border clashes and territorial wars have been registered between Somali and her neighbours Kenya and Ethiopia, Somalia may no longer state that it desires to pursue only legal and peaceful means to settle her claimed territorial problems.

From the time of attainment of their political independence, there was no boundary treaty or agreement between Kenya and Somalia, until in 1967 as a result of the O.A.U. mediation on the case, a declaration was signed

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67. See McEwen, op.cit., p.115.

by the two countries.

The O.A.U. Declaration on Kenya-Somali Relations, which comes in the form of a resolution adopted at the Fourth Ordinary Session of the Assembly of the Heads of State and Government, held at Kinshasa, Zaire, stresses the desire of the Organisation to consolidate the fraternal links which unite the African States and peoples.

In 1965, the good offices of His Excellency President Julius K. Nyerere of the Republic of Tanzania, were still hard to resolve.<sup>68</sup> It is due to the persuasive approach of the O.A.U. and the good offices of His Excellency President Kenneth D. Kaunda of the Republic of Zambia that the two disputing parties agreed to resolve the issue.

In the resolution, the O.A.U. notes with great pleasure that a joint Declaration mutually and amicably reached between the Governments of Kenya and Somalia, as represented by Vice-President Daniel Arap Moi and Prime Minister Mohamed Ibrahim Egal, respectively, through the good offices of the President of Zambia, reads as follows:

1. Both Governments have expressed their desire to respect each other's sovereignty and territorial integrity in the spirit of paragraph 3 of Article III of the O.A.U. Charter;

2. The two Governments have further undertaken to resolve any outstanding differences between them in the spirit of paragraph 4 of Article III of the O.A.U. Charter;

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68. For historial purposes see International Boundary Study No.134 - May - 1973: Kenya-Somali Boundaries; MCEwen, op.cit. pp.113-134; U.K.-Portugal: Agreement respecting boundaries in South-East Africa (from No.1 on the left bank of Malosa River to Beacon No.17 on the Shore of Lake Nyasa), in League of Nations Treaty Series, Vol. 4, ...



3. The two Governments have pledged to ensure maintenance of peace and security on both sides of the border by preventing destruction of human life and property;
4. Furthermore, the two Governments have agreed to refrain from conducting hostile propaganda through mass media such as radio and the press against each other;
5. The two Governments have accepted the kind invitation of President Kaunda to meet in Lusaka, during the later part of October, 1967, in order to improve, intensify and consolidate all forms of co-operation.<sup>69</sup>

Appropriately, the O.A.U. Kinshasa Resolution requested the Governments of Kenya and Somalia, as parties to the Declaration, and the Government of Zambia as host and convenor, to submit a progress report on the proposed meeting in Lusaka to the Secretary-General of the O.A.U. However, that meeting took place in Arusha, Tanzania, on the 28th October, 1967, under the auspices of the O.A.U. with President Kaunda of Zambia acting as mediator. At the end of that meeting, the Arusha Memorandum of Agreement was signed by Kenya and Somalia; under the terms of the Memorandum, the two parties agreed inter alia:

- a) to maintain peace and security on both sides of the border by preventing destruction of human life and property;
- b) to refrain from conducting hostile propaganda through mass media such as radio and the press, against each other, and to encourage propaganda which promotes the development and continuance of friendly relations between the two countries;

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68. Continued ....

1921, p.93; U.K.-Belgium: Convention with a view to facilitating Belgian Traffic through the territories of East Africa, 15 March, 1921, in League of Nations Treaty Series, Vol.5, 1922.

69. See Brownlie, Basic Documents on African Affairs, loc.cit. above pp.362-63.

- c) to suspend gradually any emergency regulations imposed on either side of the border;
- d) to re-open diplomatic relations between the two countries;
- e) to consider measures encouraging the development of economic and trade relations.

The Memorandum also provided for the creation of a Working Committee consisting of Zambia, and the two disputing parties. It was to meet periodically to review the implementation by Somalia and Kenya of points agreed in the Memorandum. The Working Committee was also charged with the duty to examine ways and means of bringing about a satisfactory solution to the whole problem between the two countries.<sup>70</sup>

It remains to be seen how long it will be before this document is torn up by Somalia in pursuit of its Somali peoples' re-unification programme. According to an Article published in The Times of Wednesday February 8, 1978, "Kenya stays friends with Ethiopia despite its military Marxist regime: Ogaden war revives fears of Somali aims".<sup>71</sup> In this Article a Special Correspondent of The Times notes that the war in the Ogaden area of Ethiopia, between Somalia and Ethiopia, revives fears of Somali aggression against Kenya. The writer states that "despite somewhat qualified assurance from its leaders, the Mogadishu Government is strongly suspected of wishing to see Northern Kenya, with its predominantly ethnic Somali population, become a part of the Somali Republic."<sup>72</sup>

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70. See Cukwurah, "O.A.U. and Boundary Problems", op. cit., p.199.

71. See The Times Wednesday February 8, 1978, "Ogaden war revives fears of Somali aims", p.7.

72. See Ibid., p.7. It is useful to show the documentation regarding the territorial and boundary demarcation ...../



## 5. Somalia - Ethiopia<sup>73</sup> territorial controversy

It has already been mentioned above that the discovery of gas and the hint that there may be oil in the Ethiopian area of the Ogaden, is in my view the major reason for Ethiopia and Somalia to continue this dispute

### 72. Continued ....

treaties which have relevance to the present boundary dispute between Kenya and Somalia, see International Boundary Study No.134 - May 14, 1973, "Kenya - Somalia boundary", p.20:

1. Protocols between the Governments of Her Britannic Majesty and His Majesty the King of Italy, for the Demarcation of their respective Spheres of Influence in Eastern Africa, March 24 and April 15, 1891, Great Britain Treaty Series, Italy No. 1 (1891). C.6316.
2. Agreement between the United Kingdom and Ethiopia relative to the Frontiers between British East Africa, Uganda, and Ethiopia, December 6, 1907, Great Britain Treaty Series No.27 (1908), Cd.4318.
3. Convention between Italy and Ethiopia for the settlement of the Frontier between the Italian Possessions of Somali and the Provinces of the Ethiopian Empire, May 16, 1908. The Map of Africa by Treaty, Vol.2, 3rd Edition, (London: Harrison and Sons, 1909), pp.1223-4.
4. Treaty between the United Kingdom and Italy regulating Certain Questions concerning the Boundaries of their respective Territories in East Africa, July 15, 1924, Great Britain Treaty Series, Italy No. 1 (1924), Cmd. 2194 (with maps).
5. Treaty between the United Kingdom and Italy regulating Certain Questions concerning the Boundaries of their respective Territories in East Africa, July 15, 1924, Great Britain Treaty Series, No.29, (1925), Cmd. 2427.
6. Agreement recording the Decisions of the Commission appointed under the Treaty between the United Kingdom and Italy of July, 15, 1924, regarding the Boundary between Kenya and Italian Somaliland, December 17, 1927, Great Britain Treaty Series, Italy No.1 (1933), Cmd. 4230.
7. Agreement between the Local Commissioners appointed to settle certain points connected with the Demarcation of the Boundary between Kenya and Italian Somaliland as determined by the Commissioners under the Treaty between the United Kingdom and Italy of July, 15, 1924; August 27, 1930, Great Britain Treaty Series, Italy No.2 (1933), Cmd. 4231.
8. Exchange of Notes between His Majesty's Government in the United Kingdom and the Italian Government regarding the Boundary between Kenya and Italian ..../

despite attempts made by the O.A.U. to mediate in order to resolve the problem within the spirit of Article III(3) (4). Again we find that it is the question of territorial and economic sovereignty which becomes of major or paramount interest for the parties to a territorial or boundary dispute. Though in this case, like in any other territorial or boundary dispute, economic considerations are usually not made explicit, but instead, the reason given is the principle of self-determination. Thus the right of a particular people to political independence is strongly or even over stressed, and used as a pretext to secure a territory by the adjacent states to the disputed area. France, Britain and Italy who shared among themselves what used to be Somali territory, had made territorial adjustments with neighbouring Ethiopia. Under such adjustments, the Somali population was segmented and brought within different jurisdiction.<sup>74</sup>

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72. Continued .....

Somaliland with the Agreement of the Boundary Commission, Appendices and Map, November 22, 1933, Great Britain Treaty Series No.1 (1934), Cmd. 4491.

73. See Cotran, "Legal problems arising out of the Formation of the Somali Republic", op.cit.; Hoskyns 2: "The Ethiopia-Somali-Kenya Dispute, 1960-1967, loc.cit. above; Cukwurah, "O.A.U. and Boundary Problems", op.cit. "The Ethiopia-Somali-Kenya Dispute", pp.193-201; "Boundary Convention Between Ethiopia and France, signed at Addis Ababa 20 March, 1897", in Clive Parry, The Consolidated Treaty Series, Vol.184, 1896-1897, (N.Y., London, 1979), pp.318-319.

74. See International Boundary Study, Vol.153, "Ethiopia-Somali Boundary", p.2.



In 1887, the Treaty of Wichale was signed by Ethiopia and Italy. The terms of this were a source of disagreement immediately after its conclusion. This was due to a misunderstanding which had arisen regarding the interpretation of the treaty by both parties. Italy chose to interpret the treaty to mean that Ethiopia had, by signing the treaty, surrendered its sovereignty and become an Italian protectorate. On the other hand, Ethiopia had argued that it did not give up its sovereignty, but that the "Emperor could, if he so desired, request Italian advice and help in foreign affairs". Through a number of protectorate treaties concluded between colonial Powers, Italy, by 1889 had made direct claims over Somalia along the Indian Ocean. One of these treaties of protectorate claimed by Italy was signed by Italy and the U.K. on 24 March, 1891. It delimited, in defiance of the Wichale Agreement, the spheres of influence between Italy and the United Kingdom in the area. Another treaty concluded between Italy and the U.K. on April 15, 1891, delimited British and Italian spheres of influence inland from the Red Sea to the Blue Nile.

Again on May 5, 1894, acting as protector of Ethiopia, Italy signed a treaty with the United Kingdom establishing a boundary between the British Somaliland and Ethiopia:

1. The boundary of the spheres of influence of Great Britain and Italy in the regions of the Gulf of Eden shall be constituted by a line which, starting from Gildessa (Jeldessa)

and running towards the 8th degree North latitude, skirts the north-east frontier of the territories of the Girrhi, Bertiti, and Rer Ali Tribes, leaving to the right the village of Gildessa, Darmi, Gig-giga (jijiga), and Milmil. On reaching the 8th degree of north latitude the line follows that parallel as far as its intersection with the 48th degree of longitude east of Greenwich.<sup>75</sup>

Perhaps the most relevant treaty to the Ogaden Ethiopian Area, which is currently being claimed by Somalia, is the one signed on May 16, 1908. On that date, a Convention between Ethiopia and Italy created a new Ethiopia-Italian Somaliland boundary between Dolo and the Uebi Scebeli (Wabi-shabale).

Under Article IV of that Convention, the Ogaden belonged to Ethiopia. It reads as follows:

IV. - From the Uebi Scebeli the frontier proceeds in a north-easterly direction, following the line accepted by Italy - the Italian Government in 1897; all the territory belonging to the tribes towards the coast shall remain on Italy; all the territory of Ogaden, and all that of the tribes towards the Ogaden, shall remain dependent on Abyssinia (Ethiopia)."<sup>76</sup>

This treaty gives all the traditional area of the Ogaden to Ethiopia. This area was located in the approximate area of south-eastern Ethiopia, bounded on the north by British Somaliland and on the east by Italian Somaliland. When the Somali Republic composed of former British Somaliland and Italian Somalia became independent in 1960, the new Republic was determined to regain the lost territories and re-unite them to form the traditional Greater Somaliland.

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75. See "Ethiopia-Somali Boundary", loc.cit. n.75, p.2.

76. See "Ethiopia-Somali Boundary", op.cit., p.4.



In 1946, just a year after the formation of the U.N., the Ogaden area of Ethiopia was on the Agenda in the General Assembly as well as in the Fourth Committee. In that year, the British Foreign Secretary, Ernest Bevin, proposed that all the Somali territories should be brought together under U.N. Trusteeship, but the suggestion was rejected by the Russians and the Americans, who felt that the Ogaden and Haud areas belonged to Ethiopia. Hence only the Italian Somaliland was put under Italian Trusteeship.

These ideas of re-unification of Somali territories were not only given by Bevin, but the late President Dr. Nkrumah of Ghana held the view that there was a need to redraw the colonial boundaries of African countries. In October 1961, when the Somali leaders visited Ghana, they signed with Dr. Kwame Nkrumah, a communique defending the redrawing of colonial boundaries. This communique was naturally viewed by Somalia as great encouragement to claim her territories from Kenya and Ethiopia. Consequently, there has been increasingly continuous hostile propaganda conducted by Somalia against her two neighbouring countries (Ethiopia and Kenya) resulting not only in frequent border incidents, but in the Ethiopia-Somalia Ogaden War of 1977-78.

It may be mentioned here that the United Nations failed to pass a firm resolution on the question of the boundaries between Ethiopia and Somalia. Prior to attainment of independence by Somalia, the U.N. General Assembly attempted at its 14th session (1959) to pass "a resolution

regarding the Ethiopia-Somalia boundary",<sup>77</sup> but it failed because the Fourth Committee was unable to make a recommendation on the matter. Following independence, Somalia withheld recognition of the Anglo-Ethiopian delimitation of pre-independence, and afforded only de facto recognition to all boundaries with Ethiopia.

O.A.U. mediation role has been exercised on the question of the Ethiopia-Somalia territorial dispute. The O.A.U. Council of Ministers meeting at Lagos (February 24-29, 1964) passed a resolution (6(II)) requesting the Governments of Ethiopia and Somalia, inter alia, "to maintain the ceasefire which they had immediately ordered following appeals made at Dar-es-Salaam; to open direct negotiations with a view to reaching a peaceful solution of the border dispute and report on the result of these negotiations at the next O.A.U. Conference of Heads of State and Government,"<sup>78</sup> held in 1964.

Using the good offices and initiative of Lieutenant-General Ibrahim Abboud, of the Sudan, an agreement<sup>79</sup> was signed on a ceasefire, and appointment of supervisory joint commission for the withdrawal of military forces to a distance of between 10 to 15 Km. from either side of the border between Ethiopia and Somalia. This ceasefire was to start on April 1st, 1964 and complete withdrawal by April 6th, the same year.

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77. See "Ethiopia-Somali Boundary", op.cit., pp.6-7.

78. See Indian Journal of International Law, Vol.13, 1973, p.195.

79. From text of the Joint Communique by Ethiopia and Somali Governments after negotiations in Khartoum, 30 March 1964, see Hoskyns, op.cit. n.57, pp.65-66.



However, in July 1964, there was a change of Government in Somalia, following a vote of no confidence passed on the government which had ruled the country since independence. Consequently, no negotiations took place between Ethiopia and Somalia as requested by the O.A.U. In fact, the dispute between these countries was deleted from the Agenda of the O.A.U. Conference of Heads of State and Government held in Cairo 17-21 July, 1964. It was at this Conference, as indicated above, that the O.A.U. passed a general resolution (which in fact affirmed the relevant principle enshrined in the O.A.U. Charter) on territorial and boundary disputes in Africa, calling on all member States to respect the borders existing at the time of attainment of national political independence.<sup>80</sup>

Due to the fall of the Somali Government as stated above. Somalia was absent from the O.A.U. 1964 Cairo Conference, and therefore did not vote. However, there were countries which had border disputes with their neighbours which did vote for the resolution. It was Morocco, whose dispute (at the time) with Algeria and Mauritania were discussed at the Conference, which voted against that Resolution.

The O.A.U. continued however to argue that Ethiopia and Somalia should re-open negotiations, and in April 1965, the two countries agreed to this in principle. At the O.A.U. Summit held in Accra, Ghana, in October 1965, the two disputing parties entered into

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80. For the text of the O.A.U. general resolution on border disputes, see Brownlie, Basic Documents on African Affairs, loc.cit., pp.360-361.

an informal agreement to refrain from the dissemination and repetition of hostile propaganda against each other. That informal agreement was reached to some extent on the basis of an earlier agreement signed by the parties in March, 1964, at Khartoum, Sudan. The 1964 Agreement provided that the parties should refrain from pursuing hostile propaganda.

The Ethiopia-Somalia territorial dispute which is older than the O.A.U. itself, could not be solved by peaceful methods, at least in the eyes of Somalia. This is so because in 1977, Somalia, using the Western Somali Liberation Front, started the Ogaden War against Ethiopia.

The Western countries having created, as shown above, the territorial and boundary disputes in Africa as a whole, and in this particular respect, in Eastern Africa and the Horn of Africa, their representatives go on to make comments which imply that the Africans were to blame regarding the disputes. One Western Diplomat made a comment in Nairobi, as long ago as 1976, before the Ogaden War that:

"We must now regard the whole of this part of Africa as a potentially explosive area", said the Diplomat pointing on a map to an expanse of territory stretching from the Red Sea to the Kenyan-Tanzanian border, "almost all the countries in this region are in dispute with each other."<sup>81</sup>

Nicholas Ashford writes:

The hostile words which have been hurled between Kampala and Nairobi during the past two and a half weeks, although now subsiding, have dramatically demonstrated the basic instability of Eastern Africa. If war had

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81. See Nicholas Ashford, "An Area of Complex and Dangerous Rivalries", in The Times Friday July 23, 1976, p.7.



broken out it could have involved at least two other African countries, Ethiopia and Somalia, as well as the big powers. The rivalries between the East African nations are almost as complex and dangerous as those which divided the Balkan states before the First World War. Relations between Kenya and Uganda are likely to remain tense for at least as long as President Amin remains in power. Kenya also has problems with Somalia, which has a long-standing claim to a large area of north-eastern Kenya.

Somalia has other claims over a large part of eastern Ethiopia inhabited by Somali tribes and, most important of all, over the French Territory of the Afara and Issas (normally known as Djibouti). Ethiopia itself has internal problems caused by the revolt of the northern Muslim province of Eritrea.

When the Ogaden War started, while Britain, U.S.A. and other Western Powers were reluctant to take sides directly, and thus confront the Soviet Union, the U.S.S.R. reluctantly, and at a later stage of the war, supported the Ethiopian territorial sovereignty and integrity. The O.A.U. did not stand aloof, it resumed its role of mediation, and it is understood that Nigeria was acting as mediator in the matter on behalf of the Organisation for African Unity. Earlier on, towards the end of 1977, Sudan was reported to have been mediating or offered to do so on behalf of the O.A.U. But its President Nimeiry had issued a statement in support of Somalia, which had put Sudan in the position of an interested party, a circumstance which normally inhibits a State from playing the role of mediator.

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82. See "Ethiopia-Somali Boundary", op.cit., pp.11-12.

1. Agreement between the British and French Governments with regard to the Gulf of Tadjoura and the Somali Coast, February 2-8, 1888. Edward Hertslet, The Map of Africa by Treaty, 3v. 3rd Edition, (London: Harrison and Sons, 1909), Vol.2, pp.726-728.

## Conclusion

In concluding this chapter it may be stated that:

1. States, Peoples and Nations may exercise territorial and economic sovereignty. It is important to recognise that as subjects of the principle of self-determination, peoples striving to establish an independent state may exercise sovereignty, albeit, in

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82. Continued ....

2. Protocols between the Governments of Her Britannic Majesty and of His Majesty the King of Italy, for the Demarcation of their respective Spheres of Influence in Eastern Africa, March 24 and April 15, 1891. United Kingdom Treaty Series, Italy No.1 (1891), Cmd. 6316.
3. Protocol between Great Britain and Ethiopia respecting the Demarcation of their respective spheres of influence in Eastern Africa, May 5, 1894, United Kingdom Treaty Series, No.17, 1894.
4. Treaty between Great Britain and Ethiopia (Frontiers of British Protectorate of Somali Coast), May 14, 1897, The Map of Africa by Treaty, op.cit., pp. 423-430.
5. Agreement between Great Britain and Ethiopia relative to the Frontiers between British East Africa, Uganda and Ethiopia, December 6, 1907, United Kingdom Treaty Series, No.27, Cmd.4318 (with map).
6. Convention between Italy and Ethiopia for the settlement of the Frontier between the Italian Possessions of Somali and the Provinces of the Ethiopian Empire, May 16, 1908. The Map of Africa by Treaty, op.cit., pp.1223-4.
7. Treaty between the United Kingdom and Italy regulating certain Questions concerning the Boundaries of their respective territories in East Africa, July 15, 1924, United Kingdom Treaty Series, Italy No.1 (1924). Cmd.2194 and United Kingdom Treaty Series No.29 (1925). Cmd.2427 (each includes a map).
8. Clifford, E.H.N., "The British Somaliland-Ethiopia boundary", The Geographical Journal, Vol.LXXXVII No.4, April 1936, pp.289-307.
9. Letter (and note), dated 1 March 1950, received by the President of the Trusteeship Council from .... /



a limited way. But this exercise of the right to self-determination by peoples and nations may come into conflict with the right of the State to preserve its territorial integrity and sovereignty.

2) There is a link between the exercise of economic self-determination and territorial sovereignty. Hence territorial or boundary disputes may emanate from economic considerations or interests.

3) Both the U.N. and O.A.U. Charters provide for the respect of State's territorial integrity and sovereignty. Thus the U.N. and O.A.U. laws forbid a State to threaten or use force in order to gain control of the territory of another State.

4) The O.A.U. and the member States have opted for the preservation of a status quo on the issue of maintaining the territorial boundaries inherited by the new African States at the time of attainment of political independence. Thus African international law asserts the legal regime governing the conduct of States regarding problems concerning territorial sovereignty. The same law imposes a legal constraint so far as territorial or boundary rectification is concerned. African international law is more specific and firm in regulating

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82. Continued ....

the Permanent United Kingdom Representative on the Council, United Nations Trusteeship Council Official Records, Annex, Vol.1, Fourth Year, Sixth Session, Document T/484, (note contains present alignment of provisional administrative line).

10. Agenda item 40: Question of the frontier between the Trust Territory of Somaliland under Italian administration and Ethiopia, reports of the Governments of Ethiopia and Italy, United Nations General Assembly Official Records, Annexes, Eleventh Session, 1956-7.

States' territorial and boundary relations than it is on governing economic matters between the African countries.

5) Although African International law strictly requires that territorial or boundary disputes be settled by peaceful means, some African countries have invoked violence to acquire the claimed territories or to unlawfully adjust the disputed boundaries. This law also requires that African States enter into treaty or agreement arrangements in order to resolve any territorial or boundary controversies.

6) In the territorial or boundary disputes discussed above, the disputants have not been able to permanently settle their problems by treaty or agreement arrangements. This is so because from time to time, some disputants revert to the same dispute when they find it in their interest to do so.

7) The re-adjustment of territorial or redefining of borders by any African State retards economic development not only of the disputants, but of many other countries in the continent.



## CHAPTER 6

PEACEFUL SETTLEMENT OF ECONOMIC DISPUTES  
IN AFRICAN STATES

Introduction

In this chapter we discuss the pacific settlement of economic disputes among African States since their attainment of political independence. The study examines the relevant legal and institutional instruments employed to prevent and resolve international economic disputes emanating in areas where "rules or standards for the management of international economic relations are in question".<sup>1</sup>

Discussion will concern those dispute settlement provisions which are contained in African domestic laws; international agreements; and regional, sub-regional, and inter-regional instruments.<sup>2</sup> The patterns of institutional machineries examined include that of the International

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1. See J. Fawcett, International Economic Conflicts: Prevention and Resolution, (London, 1977), p.2. For a general discussion, see Ibid., pp.1-82; David Davies Memorial Institute, International Disputes: The Legal Aspects, (London, 1972); Idem., International Disputes: The Political Aspects, (London, 1971); Id., International Disputes: Case Histories 1945-1970, (London, 1973); S.A. Tiewul, and F.A. Tsegah, "Arbitration and the settlement of commercial disputes: A selective survey of African Practice", in I.C.L.Q., Vol.24, 1975, pp.393-419; Linda A.B. Miller, World Order and Local Disorder: The United Nations and International Conflicts, (New Jersey, 1967); H. Fox, "The settlement of disputes by African Attitudes", in International Relations, Vol. 3, 1968, pp.389-410; J.H. Young, "International Remedies in Investment Disputes: A Forward view", in Rights and Duties of Private Investors Abroad, Vol.359, (Chicago, 1965); Arechaga, "International Law in the Past Third of a Century", op.cit., Ch.2 above.
  2. See J.H. Jackson, Legal Problems of International Economic Relations: Cases, Materials, and Text, (Michigan, 1977); Ibid., Book Review by J.C. Tuttle, in The Inter- ....

## Centre for Settlement of Investment Disputes.

Section A. Settlement of economic disputes under domestic laws1. Investment laws, Acts, Decrees, and Codes

There are certain basic questions that immediately come to mind when one discusses the settlement of economic disputes under domestic laws. The first question concerns the nature of disputes. Since there are various economic disputes that may require settlement under domestic laws, it is important to identify the nature of particular disputes to be settled. As is shown below, the nature or type of economic disputes to be settled is described by investment laws or by economic agreements between the parties. Where a domestic law contains a provision on the settlement of economic disputes, it is in that provision that the nature of disputes is also described. This point is illustrated by the Niger Investment Code provision cited below in this section.

The second question relates to the circumstances which lead to the settlement of economic disputes. Here we simply ask the question: when does the necessity to settle an economic dispute arise? This point is illustrated by the Mauritanian investment law also described below. That law provides that necessity to settle an economic dispute may arise when the Parties fail to

## 2. Continued ....

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national Lawyer, Vol.12, pp.695-96; P. Sanders, "Trends in the Field of International Commercial Arbitration", in Recueil Des Cours, 1975, Vol.145, (Leiden, 1976), pp.205-296; A.F. Lowenfield, International Economic Law, (N.Y., 1977); I. Brownlie, "The Justiciability of Disputes and Issues of International Relations", in B.Y.I.L., Vol.42, 1967, p.123.



implement economic or commercial agreements between them.

The third question is connected with the appointment of Arbitrators or Conciliators: especially concerning the appointment of the third Arbitrator,<sup>3</sup> when the parties fail to reach agreement on his appointment. Here the domestic laws provide that the higher judicial organs will be responsible for the appointment of the third Arbitrator, in cases where the parties disagree on such appointments. This point is made very clear under the Somalia Foreign Investment Law cited in this section below.

The fourth, last but not least, question is that relating to the decisions made by the arbitral tribunals and conciliation commissions.<sup>4</sup> The question which may be emphasised here is that concerning the way by which the decisions are reached, by the organs settling the disputes. In this connection, it is essential to note that since domestic laws provide that at least one of the parties to economic agreements may in practice appoint two Arbitrators (that is, one Arbitrator which each party is entitled to appoint, plus the third Arbitrator), especially since in most cases the third

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3. In order to comprehensively understand how third Arbitrators are appointed in accordance with the provisions of an international agreements, see I.C.J. Reports, 1950, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania; L.C. Green, International Law Through the Cases, (London/N.Y., 1970), "Interpretation of Peace Treaties", Case concerning the interpretation of Peace Treaties of 1947 between Bulgaria, Hungary and Romania, pp.587-594; L.L. Randolph, Third-Party Settlement of Disputes in Theory and Practice, (N.Y., 1973); R.O.Young, The Intermediaries: Third Parties in International Crises, (New Jersey, 1976).

4. See E.K. Nantzwi, The Enforcement of International .....

Arbitrator is appointed by the Host State, the fairness of the majority decision may be questioned. The point here is that the foreign investor who may only have appointed one of the three Arbitrators in a case, may feel that the decision reached by majority vote (as the laws require), is not fair to him. But the international law principle applied in such circumstances is that all the commercial and other dealings between the parties are operated in good faith and in accordance with provisions of the agreement. So, since agreements between the parties do stipulate which methods are to be employed to settle economic disputes, it must be presumed that, having participated in the formulation of the agreement, the parties accordingly, adhere to its implementation.

A distinction must be made between the nature of a dispute and the area out of which it may emanate. Disputes between the host State and the foreign investor may arise from areas relating to questions of economic benefits; repatriation of profits and capital; nationalisation; customs duties and indirect taxes; direct taxes and government royalties; import quotas and tariff protection; etc. The nature of the dispute may concern e.g. the implementation of a contract or decision regarding nonfulfilment of obligations. On this point it is important to see the distinction that was made by

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#### 4. Continued ...

Judicial Decisions and Arbitrary Awards in Public International Law, (Leiden, 1966); W.M. Reisman, Nullity and Revision, Review and Enforcement of International Judgments and Awards, (London, 1971); R.B. Lillich, International Claims: Their Adjudication by National Commissions, loc.cit.above; H. Lauterpacht, The Development of International Law by the Permanent Court of International Justice, (London, 1934).



the International Court of Justice concerning the difference between a "dispute" and "situation" from which a dispute arises.<sup>5</sup>

Investment laws<sup>6</sup> contain provisions either directly stipulating the settlement of disputes, or indirectly, indicating the method by which a dispute may be settled. In its direct sense, the law provides that the parties in their agreement establishing such investment operations, shall include provisions relating to the settlement of any dispute arising therefrom.

For instance, the Benin (formerly Dahomey) Law No.61-53, of 31 December, 1961, establishing the Code of Investment, provides that:

Each party is entitled to designate an arbitrator and a third is appointed with their concurrence. In the case of disagreement over the appointment of a third arbitrator, he may be named in the agreement. He must be a highly qualified

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5. See Shabtai Rosenne, The Law and Practice of the International Court of Justice, (N.Y., London, 1965), pp.292-296; Union of South Africa - Swaziland: Agreement providing for the Elimination of Double Taxation of Farmers carrying on Business both in the Union and Swaziland, signed at Mbabane, March 2, 1932, and at Capetown, March 16, 1932, in League of Nations Treaty Series Vol.CXXIX, 1932, pp.377-383; V. Gaurishankar, "Taxation of Foreign Companies: Indian Perspective with Reference to Code of Conduct for Transnational Corporations", in I.J.I.L., Vol.17, 1977, pp.21-43; S.K. Verna, "Taxation of Multinational Corporations", in I.J.I.L., Vol.16, 1976, pp.93-169; N. Kaldar, "Taxation for Economic Development", in The Journal of Modern African Studies, Vol.1, 1963, pp.7-23; V. Gaurishankar, "The Taxation Aspects of Transnational Corporations: Plea for an International Agreement", in I.J.I.L., Vol.19, 1979, pp.48-62.
  6. For further reference and discussions on investment laws, Acts, Decrees and Codes, see Ch.2 above; see also U.N. Doc.(E/CN.14/INR/28/Rev.2., "Investment Laws and Regulations in Africa", loc.cit. Ch.2 above.

judicial authority from the investing country. The decision is rendered by a majority and may be reviewed by enforcement of an award.<sup>7</sup>

Significantly, the above provision stipulates that the third Arbitrator must be designated by the investor, or as stated by the "investing country". Thus the law provides for the inclusion in the agreement of the right of investors to designate the third Arbitrator.

Under the investment law of Madagascar (Malagasy Republic), Ordinance No.62-024, 19 September, 1962, Law No. 62-024, harmonising fiscal provisions with the investment code constitution and organic law, 15 October, 1962:

#### VI. Arbitration and conciliation

To determine the indemnities, the parties can designate two delegates each to study the question and its solution. Two months after, they must submit their recommendation to the parties.

Disputes "not submitted to conciliation" are then submitted to arbitration. In the absence of the designation of an arbitrator by one of the parties within a period of a month, the arbitrator is selected by drawing lots. The list includes the First President of the Supreme Court, the First President of the Court of Appeals and the Presidents of the two high chambers. The question is then settled by an award.<sup>8</sup>

Thus we find that the provision states that a system of conciliation is inserted in the investment code of Madagascar just as this provision is also inserted in other French-speaking African countries' codes. Part (1) also provides that the host State and the foreign investor may by agreement set up a conciliation commission to study the

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7. See U.N. Doc. (E/CN.14/INR/28/Rev.2, p.32, loc.cit. above, Ch.2.

8. See Ibid., p.48; Republic of Malagasy, Foreign Investment Code, Articles 19-28, op.cit. Ch.2 above.



dispute and recommend to the parties within a period of two months, the ways in which it may be settled.

Part (2) of the Malagasy provision specifically states that disputes which are not submitted for settlement through conciliation, are settled by arbitration. If the parties do not agree on the appointment of an Arbitrator within a month's period, the Arbitrator is selected from a list of candidates by using the lot system. What is indicated by that part of the provision is that the list of candidates for selection by Madagascar will comprise candidates from the Supreme and Appeal Court chambers. This provision is different from that provided under the Benin Investment law which permits a third Arbitrator to be drawn from the country of the foreign investor.

The Mauritanian investment laws specifically refer to the settlement of investment disputes by an international arbitration, which specifically would be regarded as providing for the settlement of such disputes through either the Centre for Settlement of Investment Disputes or through an international arbitration. This provision states:

VII. Arbitration.

Settlement of disputes resulting from the implementation of a commercial agreement may become subject to international arbitration, the terms of which are stated in the agreement. Failure to meet the obligations stipulated in a government licence is referred, after initial judgment by the national tribunal, to arbitration.<sup>9</sup>

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9. See Investment laws and regulations in Africa, loc. cit. p.51.

In respect of settlement of disputes concerned with licensing, the above provision explicitly stipulates that the national settlement procedure shall be exhausted before the parties can refer the dispute to any international arbitration.

Under the Niger Investment Code:

Any dispute relating to implementation of the contract or decision regarding non-fulfilment of obligations is settled by arbitration.<sup>10</sup>

The Code also provides for the appointment of Arbitrators by nomination, one from the Ministry of Industry and Commerce and the other from the interested enterprise. The third Arbitrator is designated by the consent of the parties. In case of disagreement, the Vice-President of the National Court has the power to nominate the third Arbitrator. The award of the arbitral tribunal is immediately executed (Article 21).

In accordance with Article 17 of the Somalia Foreign Investment Law No.10, of February 13, 1960:

Any dispute between the owner of an enterprise and the Government of Somalia concerning the interpretation of enforcement should be settled as far as possible through discussions and agreements between the party concerned and the Committee on Foreign Investments. Failing this, within ninety days from the date on which one of the parties notified the other of the subject of the dispute, the matter can then be submitted to an arbitration procedure. The Board of Arbitrators, according to the law, shall be composed of one arbitrator appointed by each party and a third by the first two arbitrators selected. The President of the Supreme Court of Somalia is authorised to appoint an arbitrator if there is no agreement.<sup>11</sup>

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10. Ibid., p.54.

11. See Investment Laws and Regulations in Africa, loc. cit., p.63.



In the Somalia law we find that a Committee on Foreign Investments may by agreement or discussion with the party involved, settle an investment dispute. However, in the event of any dispute not being settled through agreement or discussion, such a dispute may be submitted for settlement through arbitration.<sup>12</sup>

What is common to settlement of investment disputes through African Investment Laws is that:

1. International arbitration or conciliation methods are recommended under the various national laws. This means that the disputes are not settled through the national courts, but rather, by third party adjudications.
2. The parties to any investment dispute (in this case the host government and the foreign investor) are each entitled to appoint one Arbitrator and the third Arbitrator may be appointed by agreement, and in the absence of a mutual agreement, by a designated authority. But the appointment of the third Arbitrator, and indeed all Arbitrators, is in accordance with the provisions of the investment laws and as provided for under the agreement entered into by the parties.
3. In cases where disagreement between the parties arises, regarding the appointment of the third Arbitrator, the laws make reference to the national High Courts, often that the high authorities in these Courts may

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12. See J.L. Simpson, and H. Fox, International Arbitration: Law and Practice, (London, 1959); East Africa: East African Common Market Tribunal, Rules of Procedure, 31 January, 1974, in I.L.M., Vol.13, 1974, p.1192; R.P. Anand, Studies in International Adjudication, (Bombay, 1969); G. Schwarzenberger, International Law: As Applied by the International Court and Tribunals, (London, 1968). See also texts of Investment Laws in Africa, op.cit., Ch.2 above.

nominate the third Arbitrator.

4. Decisions of arbitral tribunals, which are rendered by majority vote of the Arbitrators, are final and binding on the parties to the dispute.

It is also found that national laws do not include provisions stipulating the establishment of any kind of permanent Court for settlement of investment disputes. This idea may be favoured by some foreign investors, or even by some individual officials in some of the African governments, but in my opinion, the reason why there is no such legal provision in African Investment Laws, is because African States do not wish to create institutions which may give special status to private foreign investments operating in these countries. Consequently, the investment agreements are of a temporary nature. This also means that the disputes themselves are not permanent. Moreover, since application of the agreements is to be conducted in good faith, the laws do not want to be doing just the opposite: that would encourage the parties to aggravate situations from which disputes would emanate.

## 2. Constitutional protection of aliens' pension rights

Under pension laws and protection of pension rights regulations in most African States,<sup>13</sup> all persons who qualify to receive pension benefits, do receive such

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13. See for an example the Botswana Constitution 1966, in A.B. Blaustein and G.H. Flanz, Constitutions of the Countries of the World, Vol.II, (N.Y., 1972); Cmnd.7758, Rhodesia - Summary of the Independence Constitution, loc.cit., above.



benefits irrespective of their nationality. The criteria for pension eligibility are defined by the laws and other regulations which are employed for the purpose. The main qualification for eligibility to receive pension and other benefits is determined by the services the individual, (or group of persons), has rendered to the country; but nevertheless, the individual must also have contributed to the pension funds established under the laws of that country. This means that citizens and foreigners working for a particular country, who are contributors to its pension funds, and are entitled to pension under its laws, qualify to receive such benefits.

However, the problems that have been experienced by newly independent African States concern pension rights of nationals of other countries and most particularly, nationals of the metropolitan State, at the time when an African country attains political independence. Problems concerning the pension rights of such aliens arise when, for any reason, the individual or group of aliens, decide to leave the African country to establish their permanent residence in other countries, or when persons choose to take up the nationality of another country, thus in certain circumstances opting to lose their nationality of the particular newly independent African State. Pension problems may also arise when the newly introduced pension laws provide differently from the previous laws. In all these situations, the new law will do justice by including

provisions relating to the previous pension laws.

Some African countries have included pension rights provisions in their national constitutions. This is true of some former British dependencies. But the former French and Portuguese dependencies have introduced new separate laws and provisions to regulate pension problems.

Section 117 of the Botswana independence Constitution,<sup>14</sup> inter alia, provides as follows:

- (1) The law to be applied with respect to any pension benefits that were granted to any person before the coming into operation of this Constitution shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.
- (2) The law to be applied with respect to any pension benefits (not being benefits to which subsection (1) of this section applies) shall :
  - (a) in so far as those benefits are wholly in respect of a period of service as a public officer that commenced before the date on which this Constitution comes into operation, be the law that was in force immediately before that date; and
  - (b) in so far as those benefits are wholly or partly in respect of a period of service as a public officer that commenced after the date on which this Constitution comes into operation, by the law in force on the date on which that period of service commenced, or any law in force at a later date that is not less favourable to that person.

Thus it is apparent here that the law that will apply to determine pension rights of persons who may receive such benefits is the law in force at the date when the benefits were granted, or the law in force at the period when service

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14. See Botswana Constitution 1966, op.cit. above.



commenced, or any other law in force at a later date which is not less favourable than the previous law to the person exercising such pension rights. The Constitution also provides that when a person is entitled to exercise an option as to which of the laws is applicable to his case, the law that person opts for is deemed to be more favourable to him than other laws or law. This means that since the individual has, under the Constitution, the right to choose which law is employed in his case, any pension problems arising, will be settled under the law of his choice.

One of the most important questions that arise is the definition of persons eligible for pension. This may be revealed by defining the pension benefits themselves. Sub-section (5) of Section 117 (Botswana Constitution) prescribes that "pension benefits", are any pensions, compensations, gratuities or other like allowances for persons in respect of their service as public officers or as members of the armed forces or for the widows, children, dependents or persons representative of such persons in respect of such service.

Sub-section (7) of Section 117 stipulates that reference to service as a public officer includes reference to service as a public officer of the former British Protectorate of Bechuanaland (Botswana). Thus it is understood that indirectly, the law here refers to former British public service officers who have served in Botswana prior to its attainment of political independence. Moreover, in Botswana, like in many other

former dependent African territories, public services were composed of nationals from the metropolitan States. In fact only a very small percentage of public officers were African natives during the colonial period. This is one of the reasons why, in some of those countries, new laws may appear to be harsh regarding the regulation of pre-independence pension rights of foreigners.

Sub-section (6) of the Botswana Constitution<sup>15</sup> stipulates that the law referred to in Section 117 of the Constitution is the law which deals with pension benefits including (without prejudice to their generality) the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of any such benefits. Section 118 of the Constitution defines the powers of Commissions relating to pension and other related matters. One of the main functions of the Commissions is to put the pension laws into effect.

It may be mentioned that, as history has shown, such constitutional guarantees, as the ones in the Botswana Constitution, are changed when or if there is a change of government by means of a coup d'etat. But even when such constitutional revocation occurs, in most such countries, the newly introduced pension laws do provide the preservation of individual's pension rights.

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15. Analysis of the Botswana Constitution as above provides an example of constitutional protection of pension rights of foreigners. Similar provisions can be found in the national Constitutions of Kenya (section 112); The Gambia (sections 116-117); Ghana (Section 15); and Zambia (section 133); to mention just a few.



It is noticed that the texts of the pension provisions in the Constitutions of the former British African territories are almost the same in content. In fact, even the wording of the text is almost the same.<sup>16</sup> For this reason only the Botswana Constitutional pension provisions have been examined above.

## Section B. Settlement of economic disputes under International Arrangements

### 1. Foreign investment agreements

Provision regarding the settlement of investment disputes can be found in the investment agreements concluded between the African countries and capital exporting countries, or indeed between African States and other States. Such investment agreements may also be concluded between the nationals of the capital exporting countries and African States or their Agencies.<sup>17</sup>

The main objective of these agreements is to provide a legal framework for the protection of the economic interests of both the investor and host country. With this objective in mind, the State or any private investor or corporation investing in a developing country, or indeed in any country, enters into an investment protection agreement with the host State. These agreements may be

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16. See for an example the Constitutional Pension Law provisions of Kenya, Lesotho, Gambia, and Zambia. These are just some of the constitutions which could be consulted for reference purposes.
17. For references on investment agreements see Ch.2 above; A. Milner, Modern African Contract Cases: Leading Cases from Common Law, Africa in 1960's, (London, 1971); J. Cherian, Investment Contracts and Arbitration: The World Bank Convention on the Settlement of Investment Disputes, (London, 1975); O. Ouko, "East African Community", in Review of International Scientific Aid, .... /

classed under various headings, but they all essentially regard or concern various ways of investment. They may be entitled agreements on "commercial and economic co-operation"; "promotion and protection of investments"; "encouragement of capital investments and protection of investments"; etc.

An Agreement on Commercial and Economic Co-operation<sup>18</sup> was signed in 1963 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Cameroon. Article V of that Agreement describes the system for the protection of investments within the scope of co-operation between the two countries as provided by the Agreement. Article VI entitled Arbitration, is concerned with the settlement of disputes that may arise out of the interpretation or application of the provisions of Article V of the Agreement. Paragraph (1) of Article V describes the rights of each of the Contracting Parties to give formal notification to the other that such a dispute has arisen. Under this same paragraph, it is stated that any dispute between the parties will have to be settled through diplomatic

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17. Continued ...

Vol.47, (Paris, 1969); W. Goldschmidt, "Transactions between States and Public Firms and Foreign Private Firms: A Methodological Study", in Recueil Des Cours, 1972, II, Vol.136, (Leiden, 1973); G.H. Treitel, The Law of Contract, 4th Edition, (London, 1975); G.R. Delaume, "What is an International Contract? An American and A Gallic Dilemma", in I.C.L.Q., Vol.28, 1979, pp.258-279; Eugen Langen, Transnational Commercial Law, (Leiden, 1973).

18. See U.K.-Cameroon: Agreement on commercial and economic co-operation, 29 July, 1963, Cmnd.2133, in U.K. Treaty Series, Vol.38, 1962-63, p.61; M. Planck, Judicial Settlement of International Disputes, (N.Y., 1974);...../



channels or by a Mixed Commission which is provided for in Article IX of the Agreement. If the dispute is not settled within six months of the date when the notice was served, it may, at the request in writing of either Contracting Government, be addressed to the other for submission to an arbitral tribunal consisting of three members. Two of the members of such a tribunal will have been appointed, one by each Contracting Government. The Chairman of the arbitral tribunal shall be a national of a third country, and will have to be appointed by those two Arbitrators nominated by the Contracting Governments.

Paragraph (2) of the Agreement prescribes that if one of the parties fails to nominate their Arbitrator, at the request of the other party, the President of the International Court of Justice shall appoint such an Arbitrator.<sup>19</sup> In paragraph (3) reference is made to the appointment of the third Arbitrator by the President of the International Court of Justice, should the two Arbitrators fail to reach agreement on such nomination.

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18. Continued ....

M. Schmitthoff, (Editor), International Commercial Arbitration: Documents and Collected Papers, (N.Y., London, 1974).

19. See G. Schwazemberger, International Law as Applied by International Courts and Tribunals, Vol.III, (London, 1976); E. Lauterpacht, "The Development of the Law of International Organisation by the Decisions of International Tribunals", in Recueil Des Cours, 1976, IV, Vol.152, (Leiden, Netherlands, 1980), pp.377-478; N. Singh, "Codification and Progressive Development of International Law: The Role of the International Court of Justice", in I.J.I.L., Vol.18, 1978, pp.1-16.

within a period of two months of the date on which the second Arbitrator was nominated. If the President of the International Court of Justice is prevented from taking such action as provided under paragraphs (2) and (3) mentioned above, or if he is a national of one of the Contracting Parties, the nomination will be made by the Vice-President of the International Court of Justice and if the Vice-President is also prevented from so acting, or is a national of either party, then the nomination will be made by any senior member of the Court who is not a national of either party (paragraph '4'). Unless otherwise by the decision of the Contracting parties, the tribunal has the power to determine its own procedure, paragraph (5).

Paragraph (6) provides that the decision of the tribunal will be taken by majority vote and will be binding on the Contracting Parties. Such a decision is final and no appeal may be made against it. Each Contracting Government will bear the costs of its appointed Arbitrator and the costs of the third Arbitrator will be shared equally between them, paragraph (7).<sup>20</sup>

In June 1975, the United Kingdom entered into an agreement for the Promotion and Protection of Investments with Egypt.<sup>21</sup> Under Article 8 of that Agreement,

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20. See Mezerik, loc.cit., paragraph 164 discussing settlement of investment disputes under the U.K. - Cameroon: Commercial and Economic Co-operation Agreement, p.42; Nantzwi, loc.cit. above; Reisman, loc.cit.above; Randolph, loc.cit.above; A.F. Abbott, "Latin America and International Arbitration Conventions: The Question of Non-Ratification", in Harvard International Law Journal, Vol.17, 1976, p.131; L. Lazar, Transnational Economic and Monetary Law: Transactions and Contracts, (N.Y., 1977).

21. See U.K.-Egypt: Agreement concerning the Promotion and Protection of Investments, London, 11 June, 1975, Cmd. .../



the United Kingdom and Egypt undertook to submit to the ICSID<sup>22</sup> any legal dispute arising between one Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

Article 9 of that U.K.-Egyptian Agreement describes the question of settlement of "disputes between the Contracting Parties". Under paragraph (3) of the Article, an arbitral tribunal may be constituted by the Parties for each individual case. Almost the same procedure regarding nomination of Arbitrators as the one mentioned in the U.K.-Cameroon Agreement is followed under Article 9 of the U.K.-Egyptian Agreement. Also in this Agreement as in the U.K.-Cameroon Agreement the decision of the Arbitral Tribunal is final and binding on the Contracting Parties.

Declarations were drawn up in a Common Agreement by the Government of France and the Algerian National Liberation Front at Evian-les-Bains on the 18 March, 1962 relating to the exploitation of the Algerian natural resources by foreign companies. The two countries provide in one of these declarations for the peaceful

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21. Continued...

6141: Investment Protection, Egypt No.3, in U.K. Treaty Series, Vol.VIII, 1975.

22. See G. Delaume, International Arbitration: The Convention on the Settlement of Investment Disputes between States and Nationals of other States, (N.Y., 1975); Libya-Tunisia: Agreement to submit Question of the Continental Shelf to the International Court of Justice, June 10, 1977, in I.L.M., Vol.18, 1979, p.49. Settlement of investment disputes through the International Centre for Settlement of Investment Disputes (ICSID) is discussed in Section C. 4 below.

settlement of disputes.

The sole paragraph of their Declaration of Principles Concerning the Settlement of Disputes states that:

France and Algeria shall settle disputes that may arise between them by peaceful means. They will have recourse either to conciliation or to arbitration. Failing agreement on these procedures, each of the two States may refer the matter directly to the International Court of Justice.<sup>23</sup>

Thus reference is made here also for the settlement of investment disputes between two countries through the International Court of Justice but it is specified that under Title IV of the Declaration an international court of arbitration set between the two countries will be utilised before recourse to the settlement of disputes through the International Court of Justice.

Finally, it may be stated that foreign investment agreements between African and capital exporting countries, containing the investment dispute settlement clause, are a better legal arrangement than any other similar economic agreements which do not contain the same kind of provision. This conclusion is drawn on the basis that if the agreement contains a provision on settlement of disputes, then the Parties are bound by that provision as regards the settlement of their disputes.

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23. See Mezerik, loc.cit. paragraph 119, p.30. For the Declaration mentioned above, see France: Journal Official, No.67, 20 March, 1962, pp.3019-3039.



## 2. Problems arising in certain specific fields

In this sub-section, consideration is given to problems that are emerging from the fields of Air and Maritime International Traffic. Within the norms of the new international economic order, there is a need for African States to press for review of the standards relating to taxation in international traffic services.<sup>24</sup>

In the light of agreements concerning avoidance of double taxation<sup>25</sup> in various fields of economic or commercial Contracts between States, special examination and analysis must be devoted to the avoidance of double taxation agreements between African and advanced-market-economy nations.

Special attention must be given to this field of State commercial intercourse because of the very important,

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24. Agreements concerning the avoidance of double taxation have been concluded between African and non-African States, e.g. see Zaire-U.K.: Agreement for the avoidance of double taxation on revenues arising from the business of shipping and air transport in international traffic, 11 October 1976, Cmnd.6717, in U.K. Treaty Series, Vol.47, 1977; U.K.-Kenya: Agreement for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and capital gains, 31 July, 1973, Cmnd.6841; Zambia-Japan: Income and Fortune (General), Convention concerning the avoidance of double taxation with respect to taxes on income, signed at Lusaka on 19 February 1970, see International Tax Agreements, Vol.VIII,1970, Article 7 of this Agreement provides for avoidance of double taxation of profits from the operation of ships or aircrafts in international traffic carried on by an enterprise of a Contracting State which is taxable only in that Contracting State.
25. Further illustrations on the avoidance of double taxation may be the U.K.-Sudan: Income and Fortune (General) Convention for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and capital, signed on March 8, 1975, in Khartoum (Sudan), see International Tax Agreements, Vol.IX,1975.

indeed vital, role that is played by maritime and air transport in this international world in which the exchange of commodities and carriage of goods from one country to another is ever increasing. Due to the increased and growing trade relationships between nations, the importance of air and sea transport to both the transporting States and those that are dependent on the use of transport facilities provided by other nations, can not be ignored.

Since the majority, if not all of the African States are dependent on the transport facilities provided by the developed nations to carry African import and export goods, the question of avoidance of taxation on revenue accruing from the business of shipping and air transport is considered to be a matter that concerns the economic sovereignty of African countries. It is clear that the growth of every country's economic self-determination or even inter-relationships and inter-dependence among nations is very much encouraged and promoted by the exported and imported goods that are carried across the frontiers by air and by maritime vessels of either the exporting or importing nation, or those of other States. But as African nations do not possess sufficient vessels to transport most of their cargo and passengers to and from their territories, they have to spend considerable sums of money in payment for carriage and other such services. The only action left to them, therefore, if equitable mutual benefits are to be derived from the shipping and air



transporting industries, is to levy taxes on the revenue arising from the international traffic.

It is important to define certain terminologies connected with this topic if one is to understand its essence in both context and content. In the Agreement between the U.K. and Zaire concerning the "Avoidance of Double Taxation on Revenue arising from Business of Shipping and Air Transport", signed in London on November 11, 1975, the terms for the business of shipping and air transport and international traffic are respectively defined as follows:

1) the term "the business of shipping and air transport" means the business of transporting by air and/or sea persons, animals, goods, or mail including the sale of travel tickets connected with such transport by sea and/or air transport undertakings.

2) the term "international traffic" means any transporting by a ship or aircraft operated by an undertaking of one of the Contracting States except when the ship or aircraft is operated solely between places in the other Contracting State.<sup>26</sup>

Though I am not concerned here with the numbers of ships or aircraft belonging to or flying the flag of each of the Contracting States, even the volume of cargo and number of passengers carried by each will obviously not be equal. It is inevitable, by virtue of the large number of U.K. ships and aircraft flying the British flag which are engaged in the international traffic

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26. See U.K.-Zaire: Agreement on avoidance of double taxation, op.cit. above. Under the U.K.-Zaire Agreement the term "international traffic" means any transport by a ship or aircraft operated by an undertaking of one of the Contracting States, except when the ship or aircraft is operated solely between places in the other Contracting State. See also Article 96, of the Convention on International Civil Aviation, in U.N.T.S., ...../

between the U.K. and Zaire, that the traffic will bring more revenue to the U.K. than the few Zairen international vessels engaged in the same business will bring to Zaire. Since this revenue is tax free and the enterprises engaged in the above-mentioned business only pay taxes in their own country, the profits that accrue from these business operations will always be used in the promotion of the U.K.'s economic sovereignty and not that of Zaire. Thus, if Zaire was to benefit from the international traffic business operations, it would have to impose a certain amount of taxation on the revenue accruing from this shipping and air transport.<sup>27</sup> This means that Zaire would also be able to promote her economic independence through the profits arising from the revenue of the international shipping and air industry.

It may be useful to show how the U.K.-Zaire Agreement defines the terms "Zairian" or "U.K. undertakings". This will help to illustrate the point that U.K. or Zairian shipping and air enterprises are governed

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26. Continued ....

Vol.15, p.295. In that Convention, "International Air service" is defined as "an air service which passes through the air space over the territory of more than one State".

27. See R.M. Bird, and O. Baltimore, (Editors), Readings on Taxation in Developing Countries, (London, 1975); T. Buergenthal, Law-making in the International Civil Aviation Organisation, (N.Y., 1969); L. Humphries, I.M.C.O.: What it is, What it does, How it works, (London, 1964); Inter-Governmental Maritime Consultative Organisation (I.M.C.O.), International Conference on the Facilitation of Maritime Travel and Transport, 1965, (London, 1966); I.M.C.O., Convention on Facilitation of International Maritime Traffic 1965: Notifications by Contracting Governments under Article VIII of the Convention, (London, 1968).



and controlled by the laws operating in their own countries, and thus the revenues or profits arising from such business operations are the gains of the country of the vessels' flags.

Article 1(4) states that the term "United Kingdom undertakings" means public, semi-public or private sea and/or air transport undertakings constituted under the laws in force in the U.K. and managed and controlled in the U.K. Under Article 1(5), similar criteria apply to Zairian undertakings.

The question of exemption from payment of taxes is dealt with under Article 2 of the Agreement:

(1) The United Kingdom undertakes to exempt Zairian undertakings from all taxes on income, profits or capital gains arising from the business of shipping and/or air transport in international traffic carried on in the United Kingdom and taxable in the Republic of Zaire.

(2) The Republic of Zaire undertakes to exempt United Kingdom undertakings from all taxes on income, profits or capital gains arising from the business of shipping and/or air transport in international traffic carried on in the Republic of Zaire and taxable in the United Kingdom.

(3) The provisions of this Article shall likewise apply to income, profits or capital gains derived by such undertakings from the participation in a pool, a joint business or an international operation agency.<sup>28</sup>

In the Agreement between the U.K. and Cameroon analysed in sub-section (1) above, Article IV provides for

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28. See U.K.-Zaire: Agreement for avoidance of double taxation, op.cit. above.

co-operation in their shipping industries:

(1) The Contracting Governments shall refrain from discriminatory action and unnecessary restriction affecting shipping engaged in trade with their two countries and in particular refrain from action tending to hinder the participation of the shipping of either flag in such trade.

(2) Each Contracting Government shall refrain from action tending to hinder the freedom of the other Contracting Government or of its nationals, concerns, associations or companies to charter for the purpose of trade, ships flying its flag.

(3) Payment for shipping services shall be made in convertible currency and shall be freely transferable.<sup>29</sup>

This Agreement is successful in that the two countries reciprocally accord each other the advantages which derive from their co-operation in the shipping industries,<sup>30</sup> but the disadvantages, in terms of real profit, will be borne by the weaker economy of the Cameroon. The U.K. will benefit more than Cameroon, by virtue of its larger shipping industry, which as stipulated in Article IV above, may derive capital and profit gains free of tax from Cameroon. It is clear that that provision is adding more revenue from capital and profits to the national treasury of the U.K. than to the treasury of Cameroon.

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29. See U.K.-Cameroon: Agreement on Commercial and Economic Co-operation, op.cit. above; see also Ch.2 above.

30. See U.N.C.T.A.D., Shipping in the Seventies, (Geneva, 1972); Idem., TD/B/C/4, Report of the Committee on Shipping, 1971, (Geneva, 1971); Idem., Review of Maritime Transport 1975, (Geneva, 1975); I.M.C.O., Assembly-Eighth Session 13 - 23 November 1973: Resolutions and other documents, (London, 1974); U.N. Economic Bulletin for Latin America Vol.XVII, No.2, Second half of 1972, "The Inter-Governmental Maritime Consultative Organisation (I.M.C.O.) and maritime development - A study of the economic and social classification of the Latin American countries", (N.Y., 1973); I.M.C.O., International Conference on Special Trade Passenger Ships, 1971, (London, 1972).



Another good example of the agreements on avoidance of double taxation of income from air and shipping transport is one concluded between Egypt and the Netherlands on May 15, 1957. The Cairo Agreement between Egypt and the Netherlands was in the form of an exchange of Notes constituting an agreement between the Government of the Netherlands and of Egypt for the Reciprocal Exemptions of Air Transport Companies from Payment of Certain Taxes.

Article 1 of the Agreement stipulates that:

The Government of the Kingdom of the Netherlands .... undertakes subject to reciprocity to exempt Egyptian air transport companies from the payment of income tax on the profits derived from the operation by those companies of international air services on which their aircraft are employed. The income from the movable capital of the said companies shall also be exempted from all taxation unless the beneficiary of the distributed income has his fiscal domicile in the Netherlands.

Article 2 states as follows:

The Government of Egypt ... exempt Netherlands air transport companies from taxation on commercial and industrial profits and on income from movable capital of international air services on which their aircraft are employed, unless the beneficiary of the distributed income has his fiscal domicile in Egypt.

In the U.K.-Sudan Convention for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and capital, Article 8 deals with shipping and air transport. It provides in paragraph (1) that profits derived from the operations of ships and aircraft in the international traffic by enterprises of Contracting States shall be exempted from tax in the



other Contracting States.<sup>31</sup> Paragraph (2) of the Article states that the provisions of Paragraph (1) described above shall likewise apply to the share in respect of participation in shipping<sup>32</sup> or aircraft pools of any kind by such an enterprise engaged in shipping or air transport. Paragraph (3) specifically mentions that profits from voyages of ships or aircraft confined solely to places within a Contracting State may be taxed in that State. So Paragraph (3) refers solely to the voyages made by the ships or aircraft of another Contracting State when operating specifically within the territory of the other Contracting State.

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31. See U.K.-Sudan: Convention on avoidance of double taxation, op.cit.; Egypt-Japan: Convention on avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income, 3 September, 1968, in U.N.T.S., Vol.736, p.373; U.K.-Gambia: Agreement, Amendment of arrangements for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income, 1 April, 1968, in U.N.T.S., Vol.681, p.349; Malawi-U.S.A.: Exchange of Notes, concerning continued application to Malawi of certain treaties concluded between the U.S.A. and U.K., 17 December, 1966, in U.N.T.S., Vol.692, p.191; U.K.-Zambia: Agreement supplementary to and amending the Agreement of 25 November, 1955, between the U.K. and the Federation of Rhodesia and Nyasaland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, 6 April, 1968, in U.N.T.S., Vol.745, p.280.
32. For further Data on shipping, see I.M.C.O., The Activities of the Inter-Governmental Maritime Consultative Organisation in Relation to Shipping and Related Maritime matters, (London, 1974); I.M.C.O., Convention on Facilitation of International Maritime Traffic 1965, Supplement to the Annex, (London, 1972); I.M.C.O., Annual Report of the Inter-Governmental Maritime Consultative Organisation 1976/77, (London, 1977). Consultation machinery is "a collective negotiation system organised with a view to joint decisions or recommendations on matters of common interest to shippers and shipowners", see Consultation in Shipping: second report by the UNCTAD Secretariat (TD/B/C.4/78), Chap.I, para.6. For a discussion of promotional rates in the context of liner conference see the report by the UNCTAD Secretariat, Promotional freight rates on non-traditional exports of developing countries, (TD/105 and Corr.I) and the Supplement to that report (TD/105/Supp.I and Corr.I).



This last provision refers therefore, to the non-exemption from taxation of profits derived from ships or aircraft which fly the flag<sup>33</sup> of the other Contracting State but operate within the territory of the other Contracting State. This paragraph contains an exceptional provision in a world where international traffic is dominated by the developed nations. However the provision is of one-sided benefit since the majority of African States including the Sudan cannot even afford to operate ships or aircraft to satisfy their own domestic needs as regards the transportation of goods and persons.<sup>34</sup>

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33. Regarding the "Flags of convenience" or "open registries", the developing countries continue to see them "as cuckoos in the international shipping nest, shoving out the fledgling fleets they would like to see nurtured for themselves. In this they are in natural alliance with international transport unions, who see the system as undermining seafarers' standards of pay and service and their bargaining power to improve them", see Michael Baily, "How the tide is turning against "Flag of Convenience" Fleets", in The Times, Tuesday September 16, 1980, p.22; M. Baily, "Government assistance puts Black Star group back on an even Keel: Ghana shipping line makes new Start", in The Times, Tuesday September 9, 1980, p.16.
34. Since it is not possible, within the scope of this subsection to analyse all the agreements that contain for example only one Article on the subject of discussion or even all those agreements which actually concern the avoidance of double taxation on revenues arising from businesses of shipping or air transport in international traffic, I think it important just to mention some of these agreements. From the titles of these agreements one is able to note which of them are specific agreements concerning the avoidance of double taxation in the shipping or air industries, and which of them are more general agreements.
- 1) France-French Equatorial Africa: Income from Movable Capital, Agreement for the avoidance of double taxation ... signed at Paris on 14 December, 1956, and Brazzaville, on 3 January 1957.
- 2) Ghana-Switzerland: Income from Maritime and Air Transport, Exchange of Notes between Ghana and Switzerland concerning the taxation of enterprises operating ships and aircraft, Accra, 6 December, 1963.



With the possible exception of the U.K.-Sudan Convention therefore, in my opinion, the agreements between African and developed countries concerning the avoidance of double taxation in the international transport business rarely aid the exercise of economic sovereignty by the African States. This exemption is a part of the general pattern in the air transport. One reason for this is that it is difficult to demarcate the income accruing to each party. For instance the person buying an air ticket in Cairo may be an American returning to his country, though the ticket is bought in the former country. This problem is general.

Section C. International institutional machinery for settlement of disputes

1. Regional Machinery

The general legal and institutional machinery for settlement of disputes within the framework of the Organisation of African Unity, has been carefully laid out. Under Article III of the O.A.U. Charter, member States, in pursuit of the purposes of the Organisation (Article II), solemnly affirm and declare their adherence to

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34. Continued ....

3) Taxation, Kenya No.1 (1977): Exchange of Notes between U.K. and Kenya on Double Taxation. 31 July, 1977, London.

4) Denmark-United Arab Republic: Income from Air Transport, Exchange of Notes ... Agreement concerning The Reciprocal Exemption of Airlines from Payment of certain taxes, signed in Cairo on 1 December, 1958.

5) Sweden-United Arab Republic: Exchange of Notes for the avoidance of double taxation of income derived from air transport enterprises. Done in Cairo, 21 July, 11 September and 20 November, 1958.

The above-cited agreements may be found in the International Taxation Agreements - Collection, except that one concerning U.K.-Kenya which can be found in the U.K. Treaty Series publications.



"peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration", paragraph 4. Thus by Article (III) of the Charter, Member States recognise their obligation to settle disputes amongst themselves by peaceful means.

The machinery for settlement of disputes amongst the African States is provided under Article XIX of the O.A.U. Charter.<sup>35</sup> This provides for a Commission of Mediation, Conciliation, and Arbitration. It stipulates as follows:

Member States pledge to settle all disputes among themselves by peaceful means and, to this end, decide to establish a Commission of Mediation, Conciliation and Arbitration, the composition of which and conditions of service shall be defined by a separate Protocol to be provided by the Assembly of Heads of State and Government. The said Protocol shall be regarded as forming an integral part of the present Charter.

In part I, Article I of the Protocol, it is provided that the Commission of Mediation, Conciliation, and Arbitration as established by Article XIX of the Charter, is governed

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35. See Berhanykun Andemicael, Peaceful settlement among African States: Role of the United Nations and Organisation for African Unity, (UN., N.Y., 1976); K.V. Raman, Dispute settlement through the United Nations, (N.Y., 1977); R. Higgins, The Development of international law through the political organs of the United Nations, (London, N.Y., Toronto, 1963); R.C. Hingorani (Editor), International law through United Nations, (Bombay, 1972); W.E. Holder, and G.A. Brennan, The international legal system: Cases and Materials with emphasis on the Australian Perspective, (Sydney, Melbourne, Brisbane, 1972); A. Vandembesch, and W.N. Hogan, The United Nations background, organisation, functions, activities, (Connecticut, 1970); E. Collins, International law in a changing world: Cases, Documents and Readings, (N.Y., 1970).

by the provisions of that Protocol. This means that the Commission as a machinery for the settlement of inter-African disputes, is governed by the provisions of the Protocol.

While each O.A.U. member State is entitled to nominate two candidates, the Heads of State and Government are responsible for electing twenty-one members who constitute the Commission. The O.A.U. Secretary-General prepares a list of the candidates nominated by member States and submits it to the Heads of State and Government, (Article II of the Protocol).

The Commission's Bureau, consisting of the President and two Vice-Presidents who are also elected by the Assembly, from among the Members of the Commission, are full-time while the other eighteen members are part-time. But both the part-time and full-time members of the Commission may hold office for a period of five years. While the President and Vice-Presidents like other Members of the Commission, may be re-elected to office, they are not eligible for re-election to such offices of the presidency and vice-presidencies as they have previously occupied. Notwithstanding the expiry of their terms of office, Members of the Commission shall complete any proceedings on which they are already engaged.

The African States have adopted a system of persuasion for the disputants to accept the Commission's jurisdiction, rather than one of compulsory jurisdiction. This means that a dispute may be referred to the Commission



(a) jointly by the parties concerned; (b) by a party to a dispute; (c) by the Council of Ministers; or (d) by the Assembly of Heads of State and Government, Article XII(1). In the case of a dispute being referred to the Commission and one or more of the parties refusing to submit to the jurisdiction of the Commission, the Bureau, which is responsible for consulting the parties with regard to the appropriate mode of settling the dispute, refers the matter to the Council of Ministers for consideration. It is presumed that such a measure is required with a view to bringing diplomatic action to persuade the State concerned to accept some form of peaceful procedure for the settlement of the dispute.<sup>36</sup> If all the parties accept the exercise of the Commission's jurisdiction, then the Bureau will consult with them regarding the mode of settlement to be utilised. Article XIV stipulates:

The consent of any party to a dispute to submit to the jurisdiction of the Commission may be evidenced by:

- (a) a prior written undertaking by such a party that there shall be recourse to Mediation, Conciliation, or Arbitration;
- (b) reference of a dispute by such party to the Commission; or
- (c) submission by such party to the jurisdiction in respect of a dispute referred to the Commission by another State, by the Council of Ministers, or by the Assembly of Heads of State and Government.

Subject to provisions in the Protocol,<sup>37</sup> or in accordance

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36. See C.G. Fanwick, Foreign Policy and International Law, (N.Y., 1968); N. Bar-Yaacov, "The handling of international disputes by means of inquiry", in Royal Institute of International Affairs, Vol.2, 1974.

37. Full text of the Protocol of the Commission of Mediation, Conciliation and Arbitration is reproduced in Brownlie, Basic Documents on African Affairs, loc.cit. Ch.5 above. See also other related references given in Ch.5 above.

with any special agreement between the parties, the Commission is entitled to adopt such working methods as it deems necessary and expedient and it establishes the appropriate rules of procedure, (Article XVI).

The Commission which is accorded the important status of one of the principal institutions of the O.A.U. (Article VII of the Charter), may, when a dispute between member States is referred to it for Mediation, render its services for this purpose, only after its President has appointed, with the agreement of the Parties, one or more members of the Commission to act as mediators. Article XXI of the Protocol provides that:

1. The role of the mediator shall be confined to reconciling the views and claims of the parties.
2. The mediator shall make a written proposal to the parties as expeditiously as possible.
3. If the means of reconciliation proposed by the mediator are accepted, they shall become the basis of an agreement between the parties.

Though there have been cases of Mediation by the Commission (which I have discussed in Chapter 5 dealing with territorial and boundary disputes), because the African States "are understandably jealous of their sovereignty and independence",<sup>38</sup> it is noticeable from those cases that these States show the "same reluctance towards the O.A.U. Commission as a machinery for settling disputes as has been the experience of the International Court of Justice at the Hague."<sup>39</sup> In the words of one

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38. See Indian Journal of International Law, Vol.13, p.183.

39. See Ibid., p.183.



former Nigerian President of the O.A.U. Commission  
on Mediation, Conciliation and Arbitration:

My O.A.U. experience is that they (i.e. sovereign and independent African States) will always show great reluctance in limiting their own political and diplomatic freedom beyond what they regard as absolutely necessary to secure their immediate objectives. In one inter-State dispute after another, secret offers of assistance by my Commission could not induce the States involved in the dispute to submit to the jurisdiction of a body they persistently regard as judicial. The political element in most inter-State disputes even where such a political element is not the predominant one makes States assume that their vital interests are at stake in every dispute.<sup>40</sup>

In the case of Conciliation, request for the settlement of a dispute by conciliation may be submitted to the Commission by means of a petition addressed to the President by one or more of the parties to the dispute. Should the request be made by one of the parties, such party has to indicate that prior written notice has been given to the other parties or party. The petition is supposed to include a summary explanation of the grounds of the dispute, (Article XXII of the Protocol).

Under Article XXIII of the Protocol, the President establishes a Board of five Conciliators, three of whom are appointed by him, and one from each party. Thus the Article provides:

1. Upon receipt of the petition, the President shall, in agreement with the parties, establish a Board of Conciliators,

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40. See Ibid., p.183; M.A. Odesanya, "Reflection on the Pacific Settlement of Inter-State Disputes in Africa", op.cit. above.

of whom three shall be appointed by the President from among the Members of the of the Commission, and one each by the parties.

2. The Chairman of the Board shall be a person designated by the President from among the three Members of the Commission.

3. In nominating persons to serve as Members of the Board, the parties to the dispute shall designate persons in such a way that no two Members of it shall be nationals of the same State.

It is the duty of the Board of Conciliators to clarify the issues in dispute and to endeavour to bring about an agreement between the parties upon mutually acceptable terms.<sup>41</sup> The Board considers all questions submitted to it and may undertake any inquiry or hear any person capable of giving relevant information concerning the dispute. Should there be no disagreement between the parties, the Board then moves on to determine its own procedure. During the proceedings, the parties to the dispute are represented by their agents, whose duty is to act as intermediaries between them and the Board. Such agents may be assisted by counsel and experts.

Article XXVI of the Protocol provides that:

1. At the close of the proceedings, the Board shall draw up a report stating either:

(a) that the parties have come to an agreement and, if the need arises, the terms of the agreement and any recommendations for settlement made by the Board: or

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41. See Charles S. Rhyne, International Law: The substance, processes, procedures and institutions for world peace with justice, (Washington D.C., 1971); M. Katz, The relevance of international adjudication, (Massachusetts, 1968); Resenne, Documents on the International Court of Justice, loc.cit.above; R.A. Falk, The status of law in International Society, (New Jersey, 1970).



(b) that it has been impossible to effect a settlement.

2. The Report of the Board of Conciliators shall be communicated to the parties and to the President of the Commission without delay and may be published only with the consent of the parties.

So the most important duty of the Board of Conciliators, in my opinion, is to clarify the issues in the dispute and to endeavour to bring about an agreement between the parties on mutually acceptable terms.

Where arbitration is resorted to, each party selects one Arbitrator from among the legally-qualified members of the Commission and those two choose a third person who acts as Chairman of the Arbitral Tribunal. If within a period of one month the two Arbitrators fail to choose a Chairman, the Bureau appoints one for them. The law requires that Arbitrators should not be nationals of the parties; or employed by them; or have their domicile in the parties' territories; or be persons who have previously served as mediators or conciliators in the same dispute; no two must be persons of the same nationality. With the agreement of the parties, the President may appoint to the Arbitral Tribunal, two additional Members who need not be Members of the Commission but are accorded the same powers as the other Members of the Tribunal.

Recourse to arbitration is deemed to be submission in good faith to the award of the Arbitral Tribunal. The decision of the Arbitral Tribunal is therefore binding upon the parties. Article XXVIX of the Protocol states:

1. The parties shall, in each case, conclude

a compromise which shall specify:

- (a) the undertaking of the parties to go to arbitration, and to accept as legally binding, the decision of the Tribunal;
- (b) the subject matter of the controversy; and
- (c) the seat of the Tribunal.

2. The compromise may specify the law to be applied by the Tribunal and the power, if the parties so agree, to adjudicate ex aequo et bono, the time-limit within which the award of the arbitrators shall be given, and the appointment of agents and counsel to take part in the proceedings before the Tribunal.

In the absence of any provision in the compromise regarding the applicable law, the power of an Arbitral Tribunal is limited to deciding the dispute in accordance with the treaties concluded between the parties, with international law, the Charter of the Organisation for African Unity, and the Charter of the United Nations, unless the parties authorise it to adjudicate ex aequo et bono.

It may be noted that the hearings in the Arbitral Tribunal are held in camera unless the Arbitrators decide otherwise. The authoritative record of the proceedings is that signed by the Arbitrators and by the Registrar.

The Protocol also provides that the parties to a dispute and any other O.A.U. member States give every assistance to the Commission in any fact-finding investigation which it may deem necessary.

One very important point which I would like to make is that, while not excluding recourse to the International Court of Justice, the Organisation of African Unity does not incorporate in any way in the Organisation's machinery of peaceful settlement of disputes, the settlement



of such disputes by the World Court.

It puts at the disposal of African States an African Commission to which disputes may be referred and from which mediators, conciliators, and arbitrators may be appointed. And it relies primarily on the diplomacy and good offices of the Bureau and of the political organs of the Organisation to facilitate and encourage the effective use of the Commission's machinery.<sup>42</sup>

It has however, been observed that the O.A.U. machinery has not been employed in the settlement of economic disputes. The reason for this is that the O.A.U. machinery is of a general nature. This means that the machinery is suitable for use in the settlement of disputes other than economic ones. For example, it has been employed in the settlement of territorial and boundary disputes.<sup>43</sup>

## 2. Sub-regional machinery

As the O.A.U. does not provide the machinery for settlement of economic disputes, it is the sub-regional economic organisations like the Economic Community of West African States (ECOWAS) which have machineries for settling economic disputes between the member States. Such machineries, however, are limited to the settlement of disputes arising from the co-operation between the States of a particular sub-region. It is in the treaties establishing these sub-regional organisations that we find provisions regarding the settlement of economic disputes.

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42. See D.D. Memorial Institute, International Disputes: The Legal Aspects, p.31, loc.cit. n.1 above.

43. See Ch. 5 above.

In order to understand the essence of the subject matter, let us, as we have done in Chapter 5 above, refer to Professor James Fawcett's work "International Economic Conflicts: Prevention and Resolution". He writes:

Economic is used ... to characterise trade and movements of money across national frontiers, and access to and acquisition of resources, natural and human.

Trade or commerce is essentially the movement of goods and provision of services, bought and sold across national frontiers, where goods include manufactured and semi-manufactured products, raw materials, and agricultural products. There is probably no country in which this import and export of goods is wholly free in the sense that neither are subject to any regulation, by public authority or private agreement between group interests.<sup>44</sup>

The aim of the West African Economic Community as stipulated in the Community's Treaty is to promote co-operation and development in all fields of economic activity of the member States, particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial matters. Under the Treaty for the East African Co-operation, the aims of the East African Community are to strengthen and regulate the industrial, commercial and other relations of the Partner States.

As we clearly see, there is something in common between the statement of Professor James Fawcett cited above, and the aims which are mentioned in the Treaties of Co-operation as analysed above. Professor Fawcett's study, which not only deals with particular economic disputes between individual countries but concentrates on areas and situations of conflict where rules of

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<sup>44</sup>. See Fawcett, International Economic Conflicts, loc.cit. p.2.



international economic relations are in question, does mention areas of co-operation like those enumerated in the Treaties of African sub-regional economic co-operation. It is out of such relationships that economic disputes arise.

The importance of an institutional machinery for settlement of economic disputes has been realised by the Western African States and indeed by other sub-regional economic institutions, so much so that the organs for settling such disputes are given the status of separate primary institutions by those economic organisations. For instance under Chapter II of the Treaty of the Economic Community of West African States entitled "Institutions of the Community" it is stipulated in Article 4(d) that "the Tribunal of the Community" is one of the institutions of the Community.

Article II of the Treaty of the Economic Community of West African States which specifically describes the Tribunal of the Community, provides that:

1. There shall be established a Tribunal of the Community which shall ensure the observance of law and justice in the interpretation of the provisions of this Treaty. Furthermore, it shall be charged with the responsibility of settling such disputes as may be referred to it in accordance with Article 56 of this Treaty.
2. The composition, competence, statutes and other matters relating to the Tribunal shall be prescribed by the Authority.<sup>45</sup>

First, under Article II, the Tribunal functions as a policing organ for the Community by ensuring that law and justice is observed by the member States in their interpretation of the provisions of the Treaty. Secondly,

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45. See Treaty of the Economic Community of West African .../

the Tribunal has responsibility for settling any economic disputes that may be referred to it in accordance with the procedure laid down in Article 56 of the Treaty.

As regards the composition, competence, statutes and other matters relating to the functioning of the Tribunal, the Authority of Heads of State and Government, which is the decision-making body of the Community, has reserved the power to prescribe those functional attributes of the Tribunal. The procedure for the settlement of disputes as described in Article 56 of the Treaty is as follows:

Any dispute that may arise among the Member States regarding the interpretation or application of this Treaty shall be amicably settled by direct agreement. In the event of failure to settle such disputes, the matter may be referred to the Tribunal of the Community by a party to such disputes and the decision of the Tribunal shall be final.<sup>46</sup>

We find that according to this provision, the member States are required, in the first instance, to employ direct negotiations in order to settle their disputes amicably by reaching an agreement; it is only when this bilateral machinery has failed to produce favourable results that the member States are then required to bring the dispute for settlement by the Tribunal for the Community. Perhaps what is more important in

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45. Continued ...  
States (ECOWAS), pp.12-13, loc.cit. above Ch.3.

46. See Ibid., p.41; Togo-France: Protocol concerning settlement of real property questions, 30 April, 1968, in U.N.T.S., Vol.722, p.167; Mozambique-U.K.: Exchange of Notes concerning an interest-free loan by the U.K. to the Peoples' Republic of Mozambique, 17 August, 1976, op.cit. above.



relation to the efficiency and effectiveness of this sub-regional dispute settlement machinery is that, once the Tribunal has taken a decision on any case, that decision is final.

It may be stressed here that the parties take the dispute to Tribunal of their own accord, since they are given the opportunity of settling the dispute first by reaching a mutual agreement. Reaching such a bilateral agreement per se, enables the disputants to avoid the use of the Tribunal of the Community. But since in the event of any economic dispute, the member States and indeed any State would be interested in seeing to it that the dispute is quickly settled, purely because of the economic disadvantages or economic unprofitability that its continuity is likely to produce, the dispute will be taken to the Tribunal of the Community if direct agreement between the parties fails to bring about a settlement. And because the decision of the Tribunal is final, the parties go to it in order to get a final settlement of their disputes, which in most cases will be in the interests of all parties.

In the Treaty of East African Co-operation, which is discussed in Chapter 3 above, the Common Market Tribunal is one of the principal institutions of the Community.<sup>47</sup> Chapter X of the Treaty, entitled "The

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47. For Treaty of East African Co-operation, see Wionczek, op.cit., pp.168-233. The Statute of the Common Market Tribunal appears as Annex VIII in this same book.

Common Market Tribunal", contains provisions, from Articles 32-42, all devoted to the Tribunal as a sub-regional institutional machinery for settlement of economic disputes. Under Article 32, the duty of the Common Market Tribunal is to ensure the observance of law and of the terms of the Treaty in the interpretation and application of as much of the Treaty as appertains to the Common Market. Here we see some similarities with the functions of the West African Tribunal.

Subject to Article 33, the Tribunal was to be composed of a Chairman, who should be of the legal profession, and four other members, all of whom were to be appointed by the highest institution of the Common Market, the Authority. Each Partner State was entitled to appoint one member to the Tribunal and the Chairman, in agreement with the other three members, was to choose the fourth member. The law required only that the Chairman be of the legal profession; the other members could be appointed by reason of their knowledge or experience in industry, commerce or public affairs. The members of the Tribunal, including the Chairman, could hold office for a period of three years, or for any other period determined in their respective instruments of appointment.

If the Chairman or any other member of the Tribunal is not disinterested in the case before the Tribunal, he is replaced by new appointees, who may hold office only for the purpose and until the end of that particular case. Such members are appointed by the Authority in



accordance with the Article 33 of the Treaty. A temporary Chairman or member of the Tribunal acquires all the power and authority required for the position during such a period.

Under Article 35, the Tribunal's competence covers the acceptance and adjudication of all matters referred to it. It also possesses the jurisdiction specifically conferred on it.

Whereas the Treaty for the Economic Community of West African States requires that member States can only take their dispute to Community Tribunal when they have failed to reach an agreement on its settlement, the Treaty for East African Co-operation requires, under Article 30(d) that the Partner States refer the dispute first to an upper organ of the Community (the Common Market Council), before such dispute can be referred to the Tribunal. Article 36: Reference to the Tribunal by a Partner State:

1. Where a Partner State has made reference to the Common Market Council in pursuance of paragraph (d) of Article 30 of this Treaty, and the reference has not been determined by the Common Market Council in accordance with that paragraph within one month of the reference being made, that Partner State may refer the matter in the dispute to the Tribunal.

2. Where reference has been made to the Common Market Council in pursuance of paragraph (d) of Article 30 ..., and the reference has been determined by the Council by recording an inability to agree in relation to the reference, a Partner State which is aggrieved by such determination may within two months thereof refer the matter in dispute to the Tribunal.

3. Where a reference has been made to the Common Market Council in pursuance of paragraph (d) of Article 30 ..., and a binding

directive has been issued by the Common Market Council to a Partner State, and in the opinion of one of the other Partner States that directive is not complied with by the Partner State to which it is directed within the period fixed therein, that other Partner State may refer the question of such non-compliance to the Tribunal.

From the above two paragraphs, any one of two criteria can form a basis for referring a dispute from the Common Market Tribunal.<sup>48</sup> These criteria are:

- a) the Common Market Council's failure to satisfy all the disputant Partner States; and
- b) non-compliance with the decision on the dispute by the Common Market Council by one of the disputant Partner States.

The Tribunal, after having considered the case and determined a reference, delivers in public session a reasoned decision which, unless in contradiction with Article 22 of the Statute of the Common Market Tribunal, is final and conclusive and is not open to appeal. Under Article 22(1) of the Statute of the Common Market Tribunal, "an application for revision of a decision may be made to the Tribunal only if it is based upon the discovery of some fact of such nature as to be a decisive factor, which fact was, when the decision was delivered, unknown to the Tribunal and to the party claiming revision".

To emphasise the finality of the decision of the Tribunal, Article 41 of the Treaty for East African Co-operation provides that:

1. The Partner States undertake not to submit a dispute concerning the interpretation

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48. See Schwarzenberger, International Law: As applied by the International Court and Tribunals, loc.cit. above; .../



or application of this Treaty, as far as it relates to or affects the Common Market, to any method of settlement other than those provided for in this Treaty.

2. Where a dispute has been referred to the Common Market Council or to the Tribunal, the Partner States shall refrain from any action which might endanger the solution of the dispute or might aggravate the dispute.

3. A Partner State shall take, without delay, the measures required to implement a decision of the Tribunal.

Thus, having analysed the West and East African sub-regional institutional machineries for settlement of economic disputes, I note that the East African machinery is more comprehensive than that of the Economic Community of West African States.

It has been observed that the Convention Establishing a Central African Economic and Customs Union;<sup>49</sup> and Protocol of the Agreement<sup>50</sup> between the Kingdom of Libya, the Tunisian Republic, the Peoples' Democratic Republic of Algeria, and the Kingdom of Morocco; and the Statute of the Standing Consultative Committee<sup>51</sup> of Algeria, Morocco, Tunisia and Libya do not contain provisions for the settlement of economic disputes. However, the absence of the settlement of disputes machinery from these sub-regional organisations is not

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48. Continued ...

F.L. Grieves, Supranationalism and international adjudication, (London, 1969); D.J. Harris, Cases and Materials on International Law, (London, 1973); G. Sacerdori, "The New Arbitration Rules of I.C.C. and UNCITRAL", in Journal of World Trade, Vol.II, 1977; T.W. Thompson, "The UNCITRAL Arbitration Rules", in Harvard International Law Journal, Vol.17 Number 1, p.141.

49. See Document 9, in Wionczek, p.237, loc.cit. above.

50. See Ibid., Document 15, "Maghreb Protocol of Agreement", p.307.

51. See Ibid., Document 16, "Maghreb Statute of the Standing Consultative Committee", p.310.

explained. Thus, on this basis, one may state that not all African sub-regional economic organisations have established an insitutional machinery for settlement of economic disputes. In fact in the above-named legal instruments, there is not even a mention of disputes that may arise between member States of these economic integration groups.

However, the Convention on the Treatment of Investments in the Equatorial Customs Union,<sup>52</sup> a legal instrument entered into with a view to encouraging the establishment of large productive enterprises financed by foreign capital in the States of the Customs Union, provides under Title IV: "Contracts of Establishment", for the settlement of disputes arising from the application of the provisions of a contract of establishment. Article 33 of the Convention provides:

The settlement of disputes arising from the application of the provisions of a contract of establishment and the determination of any compensation due to one party by reason of nonfulfilment by the other party of the obligations assumed may be made the subject of an arbitration procedure which shall be further specified in each contract.

Such arbitral procedure shall specifically provide for:

- a. the designation of an arbitrator by each of the parties;
- b. the designation, in the event of the arbitrators being unable to reach agreement, of a third arbitrator by agreement between the parties or, if they are unable to reach agreement, by a highly qualified authority who shall be designated in the contract;
- c. the definitive character of the arbitral award, which shall be made by a majority of the arbitrators, being masters of their procedure and deliberating according to the principle of equity.

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52. See Ibid., Document 10, "Convention on the Treatment of Investments in the Equatorial Customs Union", p.254.



The above Article does not provide the machinery for settlement of contract establishment disputes as such; it only stipulates that the contract of establishment itself shall provide the machinery for settlement of disputes arising therefrom. Under the conditions of each specific contract of establishment, each party to the dispute may appoint an Arbitrator. The two Arbitrators are given the right to appoint the third Arbitrator. Should these Arbitrators fail to appoint the third Arbitrator, by agreement of the parties, a highly qualified person, who will have been named in the contract of establishment, may appoint the third Arbitrator.

In the final analysis it is found that the sub-regional machinery for settling economic disputes is one of the instruments used by African States. This conclusion is clearly supported by the discussion of alternative machineries in this section.

### 3. Inter-regional machinery

#### 1) Settlement of inter-regional economic disputes under the Lomé Convention I

The Lomé Convention,<sup>53</sup> which is a Treaty of co-operation between the African, Caribbean and Pacific Group (A.C.P.) and the European Economic Community (E.E.C.), contains provisions for the settlement of economic disputes that may arise between the Contracting Parties. The regional nature of the ACP countries is explained under Chapter 4 "Regional Co-Operation" of Protocol No.2 of

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53. For detailed data and further references on the Lomé Convention, see Chapter 3 above.

Convention, which deals with "the application of financial and technical co-operation".

Article 7 specifies that:

1. Within the meaning of the Convention, "regional co-operation" shall apply to relations either between two or more ACP States or between one or more ACP States on one hand and one or more neighbouring non-ACP countries on the other.

International co-operation shall apply to relations either between two or more regional organisations of which ACP States form part or between one or more ACP States and a regional organisation.

It is also specified that, within the meaning of the Convention, regional projects are those which help directly to resolve a development problem common to two or more countries through joint schemes or co-ordinated national schemes. It is within the perimeter of that economic co-operation between the EEC and ACP that economic disputes arise.

In the main text of the Convention, the Articles that either provide for the settlement of economic disputes, or mention something about the machinery for their settlement, or just refer to the settlement of such disputes are: Articles 11, 68, 74 and 81. But there are also Articles in the Protocol Nos. 1, 2, 4 and 5, which provide for the settlement of specific economic disputes in certain specified areas of economic co-operation between the two regional economic groups.

Under the Convention, the areas of economic co-operation from which disputes could arise are those connected with trade co-operation; co-operation in the



fields of services, payments and capital movements;<sup>54</sup>  
and in the area concerning institutional machinery  
for co-operation between ACP and EEC.

Under the Lomé Convention, what may be regarded  
as quasi-institutional machinery for ensuring effective  
implementation of its provisions in the field of trade  
co-operation, thereby preventing the emergence of any  
economic disputes between the parties, is Consultation.  
Article 11 provides that Consultation may take place  
at the request of the Community or of the ACP States:

1. Where Contracting Parties envisage taking any trade measure affecting the interest of one or more Contracting Parties under this Convention, they inform the Council of Ministers thereof. Consultation shall take place, where the Contracting Parties concerned so request, in order to take into account their respective interests.
2. Where the Contracting Parties envisage a preferential trade agreement they shall inform the ACP States thereof. Consultations shall take place, where the ACP States so request, in order to safeguard their interests.
3. Where the Community or member States take safeguard measures in accordance with Article 10, consultations on these measures may take place within the Council of Ministers, where the Contracting Parties concerned so request, notably with a view to ensuring compliance with Article 10(2).
4. If, during the application of this Convention, the ACP States consider that agricultural products covered by Article 2(2)(a), other than those subject to special treatment, call for special treatment, consultation may take place within the Council of Ministers.

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54. See D.G. McClelland, "The European Investment Bank Promotion of Industry in the Associated African and Malagasy States", in Journal of African Law, Vol. 19, 1975; R.H. Hull, "Much Ado about something: Dispute settlement and the Law of the Sea Convention", in International Lawyer, Vol.11, 1977, p.365; Y.C. Chieng, Legal Problems Involved in the Corfu Channel Incident, (Geneva, 1959).

Consultation, as referred to in the above Article, may be equated to agreement between the parties relating to the settlement of disputes which arise in a particular sphere of economic co-operation. The parties agree that they shall take the matters regarding such consultation to their Council of Ministers. In such a case the Council of Ministers, (composed of EEC and ACP ministers) being a principal organ of the Contracting Parties, provides a machinery for settlement of economic disputes.

Under Article 68 of the Convention, at the request of the Community or of ACP States, the Council of Ministers examines any problem raised by the application of Articles (65 to 67) relating to current payments and capital movements. Here, the Council of Ministers is also responsible for the formulation of any recommendations relevant to the resolution of disputes in the field concerned.

The Article in the Convention most explicitly concerned with the duties or competence of the Council of Ministers is Article 74. This Article provides inter alia, for the Community or ACP States to raise in the Council of Ministers any problems arising from the application of the Convention, (paragraph 7). Paragraph 8 provides for Consultations which may take place within the Council of Ministers, at the request of the Contracting Parties and in accordance with the conditions laid down in the procedure. Paragraphs 10 and 11 are concerned with the exchange of views among



the parties on questions of mutual interest. "By agreement among the parties, exchange of views may take place on ... economic or technical questions which are of mutual interest", paragraph 11.

Perhaps the Article most relevant to the settlement of economic disputes between ACP and EEC countries is Article 81. It states:

1. Any dispute which arises between one or more Member States of the Community on the one hand, and one or more ACP States on the other, concerning the interpretation or the application of this Convention, may be placed before the Council of Ministers.
2. Where circumstances permit, and subject to the Council of Ministers being informed, so that any parties concerned may assert their rights, the Contracting Parties may have recourse to a good offices procedure.
3. If the Council of Ministers fails to settle the dispute at its next meeting, either Party may notify the other of the appointment of an arbitrator; the other Party must then appoint a second arbitrator within two months. For the application of this procedure, the Community and Member States shall be deemed to be one Party to the dispute.

The Council of Ministers may also appoint a third Arbitrator. It appoints such an Arbitrator by mutual agreement and consent. This means that ACP and EEC member States mutually agree on the appointment of the third Arbitrator. The decision of the arbitral tribunal is made by a majority vote, and is final and binding on disputants. Each Party to the dispute is required to take every measure to implement the decision of the arbitral tribunal.

Paragraph 1 makes it clear that any dispute that arises between ACP States and the EEC may be put to the

Council of Ministers for settlement. In paragraph 2, it is made apparent that according to circumstances, and when the Council of Ministers has been informed, the Contracting disputing Parties may resort to the good offices procedure, after such disputants have asserted their rights and obligations.

Where the Council of Ministers fails to settle the dispute at its next meeting, any of the disputants may notify the other of the appointment of an Arbitrator, and the other party is obliged to appoint a second Arbitrator within two months. The Council of Ministers is under an obligation to appoint the third Arbitrator.

This same paragraph stipulates that the decisions of the Arbitrator are taken by majority vote, and that each of the parties to the dispute is under an obligation to take measures required for the implementation of the Arbitrators' decision. Thus it is clear here that when an arbitration tribunal set to settle a dispute between the member States has reached a decision on that particular dispute, its decision is presumed to be final. It is noted that under the Convention, there are two main institutions for settlement of disputes between the ACP and EEC countries, namely:

1. The Council of Ministers; and
2. The Arbitration Tribunal.

The Consultative machinery which exists for utilisation by the member States, who subsequently become parties to an economic dispute, may only be considered as a preliminary; it is not to be taken as part and parcel



of the main Institutions named above. It is a subsidiary element of the dispute settlement machinery.

As mentioned earlier, Protocol No.2 on "the application of financial and technical co-operation",<sup>55</sup> under its Chapter 8, dealing with the question of "competition and terms of reference for national firms" provides under Article 23 for the settlement of contract disputes.

The Article provides:

Any dispute arising between the authorities of an ACP State and contractor or supplier in the course of execution of a contract financed by the Fund shall be settled by arbitration in accordance with the rules of procedure adopted by a decision of the Council of Ministers not later than its second meeting following the entry into force of the Convention.

Here again we notice that the Council of Ministers makes the decision and adopts the rules of procedure to guide the Arbitration Tribunal which is responsible for settlement of contract disputes. Thus the machinery is maintained as indicated above.

Perhaps another example of the settlement of economic disputes provided for under the Convention, may be seen in Protocol No.1 "concerning the definition of the concept of "originating products" and methods of administrative co-operation". It is provided under Title II, which deals with "Arrangements for administrative co-operation", that:

When .... disputes cannot be settled between the customs authorities of the importing State and those of the exporting State, or when there arises a question

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55. See Protocol No.2 of Lomé Convention I, op.cit. above, Ch.3.

as to the implementation of this protocol, they shall be submitted to the Customs Co-operation Committee, (Articles 25 paragraph 3, section 2).

But section 3 of the same paragraph of Article 25 makes it clear that "in all cases the settlement of disputes between the importer and the customs authorities of the importing State shall be under the legislation of the said State". This means that since the importer will be under the jurisdiction of the importing State, consequently, any dispute which may arise between the importer and the importing State is settled under the national laws of that importing State.

A Customs Co-operation Committee which, under Article 28 of the Protocol, is responsible for carrying out administrative co-operation with the view to correct and uniform application of the said Protocol, and for carrying out any other task in the customs field which may be entrusted to it, is composed on one hand of the customs experts of the EEC and officials of the departments of the Commission of the European Communities who are responsible for customs questions, and on the other hand by customs experts representing the ACP States, and/or officials of regional groupings of the ACP States who are responsible for customs questions.

Thus I may state that the Customs Co-operation Committee mentioned above forms a machinery for the settlement of disputes which may arise in the field of administration concerning customs questions between the EEC and ACP countries.

Protocol No.4 which is on "the operating expenditure



of the institutions", states that the High Contracting Parties agreed inter alia that: "The arbitrators appointed in accordance with Article 81 of the Convention shall be entitled to a refund of their travel and subsistence expenditure. That latter shall be determined by the Council of Ministers", Article 3, section 1.

According to Protocol No.5 on "privileges and immunities", which may be claimed by persons participating in work relating to the application of the Convention and to arrangements applicable to official communications connected with such work, any disputes that may arise in this area are settled in the light of provisions in the Convention dealing with the settlement of disputes. "Article 81 of the Convention shall apply to disputes relating to this Protocol. The Council of ACP Ministers<sup>56</sup> and the European Investment Bank may be party to proceedings during an ad hoc arbitration procedure", (Article 11, Protocol No.5).

It is found appropriate to conclude this sub-section by drawing a comparison between the majority decision system of the Lomé Convention and those provided under African domestic laws, which are discussed under sub-section (1) above. It has been already stated that under national laws the majority decision system is considered to favour the host State because

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56. On the Council of ACP Ministers, see U.N.E.C.A., Doc. (E/CN/14/CEC/1 Rev.2), Directory of Inter-governmental Co-operation Organisation in Africa, (Addis Ababa, 1976). The Council of Ministers is the supreme organ of the Group of the ACP States. The Council meets in ordinary session once every six months. It is the policy-making body of the Group and arrives at its decisions by a consensus of the members or by a majority of two-thirds of the votes of the members of the Council.

in practice, the majority of arbitrators are provided by the host State, whereas under the Lomé Convention system, the members of the Council of the European Communities and members of the Commission of the European Communities and all government Ministers representative of the ACP governments, may by mutual agreement arrive at a decision regarding the appointment of the third Arbitrator. This means that since under the Lomé Convention the third Arbitrator is appointed by mutual consent of the two parties, it may be that this ensures objectively, and when the award is given, it is more likely to be accepted by the parties.

#### 4. International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes was established in 1966 under the auspices of the International Bank for Reconstruction and Development (IBRD). ICSID is an international institution created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States to resolve controversies between governments and foreign investors through conciliation or arbitration procedures.<sup>57</sup>

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57. See Convention on the Settlement of Investment Disputes between States and Nationals of other States, in U.N.T.S., Vol.575, p.160; in International Legal Materials, Vol.4, 1965; in A.J.I.L., Vol.60, 1966, p.892; I.C.S.I.D., Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents concerning the Origin and the Formation of the Convention, Vol.I, (Washington, D.C. 1970); Idem., Vol. II, Part I and II, (Washington, D.C. 1968); I.C.S.I.D., International Centre for Settlement of Investment Disputes, Thirteenth Report 1978/1979, (Washington ...../



On August 6, 1964, the Executive Directors of the International Bank for Reconstruction and Development produced a report<sup>58</sup> on settlement of investment disputes. That report was adopted by the Board of Governors of the International Bank for Reconstruction and Development on September 10, 1964, by Resolution No.214. The Board of Governors resolved:

b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and nationals of other contracting States through conciliation and arbitration.

c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.

d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate.

The Executive Directors of the Bank, acting in pursuance of the resolution mentioned above, after having formulated the convention,<sup>59</sup> submitted it to member governments of the Bank on the 18 March, 1965. However, it may be mentioned here that the action of the Executive Directors

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57. Continued ...

D.C. 1979); I.C.S.I.D., Provisional Regulations and Rules, 2nd February 1967, in I.L.M., Vol. 6, 1967, pp.223-25; I.C.S.I.D., Provisions Regulating I.C.S.I.D. in International Agreements and National Laws 9th September 1975, (Washington, D.C. 1975); I.C.S.I.D., Contracting States and Action taken by them pursuant to the Convention, I.C.S.I.D./8/Rev.5, as of February 1, 1977, (Washington, D.C. 1977); I.C.S.I.D., What it is, What it does, How it works, (Washington, D.C. 1975)

58. For the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, see Fawcett, International Economic Conflicts: Appendix, II, pp.87-98, loc.cit. above.

59. See also Ibid., "Convention on the Settlement of ...../

did not, of course, imply that the individual member governments, each of whom is represented by individual Executive Directors, were under any obligation to take action on the convention. But while the member countries are under no obligation to take action on the Convention, the text of the Convention is submitted to them for consideration with a view to signature and ratification, acceptance or approval.

At the time of formulation of the Convention, with a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which assisted the Executive Directors in their task. This Committee, which was composed of representatives from 61 member States, met in Washington from November 23 to December 11, 1964, to assist and advise on matters concerning the Convention.

In my opinion, the most salient point concerning the participation of African countries in the Convention, is not their participation at the drafting stage, but

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59. Continued ...

Investment Disputes between States and Nationals of other States", pp.99-118; John T. Schmidt, "Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes: Implications of the Decisions on Jurisdiction in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*", in Harvard International Law Journal, Vol.17, Number I, Winter 1976, p.90; C.F. Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", in I.J.I.L., Vol.18, 1978, pp.166-228.



the rights of individual member States (as provided for in the Convention) to consider the text of the Convention with a view to signing and ratifying, accepting or approving it. This implies that any member country which is accordingly invited by the Bank to sign, ratify, accept or approve the Convention is free to reject taking such an action which would bring it under the obligation to be bound by the said legal instrument. Thus, once any African State has been invited by the Bank to consider the text of the Convention with a view to signature and ratification, acceptance or approval, such a State, upon taking any such action which makes it a party to the Convention, is bound by the instrument.<sup>60</sup>

It is also important to mention that while the member countries may choose to take any investment dispute for settlement under the international methods provided for by the Convention, it has been noted that investment disputes as a rule are settled through the administrative, judicial or arbitral procedures available under the national laws of the country in which such investments are made. In this way the sovereign right is retained by the African States and indeed by any member State, either to use the facilities of the International Centre as provided for in the Convention, or to resort

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60. See R.P. Anand, Compulsory Jurisdiction of International Court of Justice, (London, 1961); Lauterpacht, loc.cit., above; W.G. Friedmann, Law in a Changing Society, (London, 1972); R.S. Comp, Documents on International Court of Justice, (Leiden, 1974); L. Gross, The Future of the International Court of Justice, (N.Y., 1976).

to national laws relating to the settlement of investment disputes. This means that even where a country is party to the Convention, the cornerstone of the jurisdiction of the Centre is the consent of the parties involved in the dispute.<sup>61</sup>

Moreover, it is stipulated in the preamble of the Convention that "no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent, be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration". While discussing the question of jurisdiction and participation of African Contracting States, it may be noted that:

4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).<sup>62</sup>

Thus, under this provision the African countries and indeed any other Contracting State members of the Convention, may classify the disputes which they may submit to the jurisdiction of the Centre. But under

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61. The question of the jurisdiction of the Centre and that of the consent of the parties is discussed in detail below.

62. See Jurisdiction of the Centre, Chapter of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, op. cit. above; Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", op.cit. above.



paragraph (1) of Article 25 of the Convention:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

According to the list<sup>63</sup> of Contracting States and Other Signatories of the Convention as of January 3, 1978, out of 73 States listed, African States members of the Convention are: Benin, Botswana, Burundi, Cameroon, Central African Empire, Chad, Congo, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, Upper Volta, Zaire and Zambia (36 States).

It may be interesting to note that in the past decade (1968-1978) the number of African State parties to the Convention has risen by 10 countries. The total number of African States parties to the Convention at the period 1967/8 was twenty-six, according to ICSID Second Annual Report figures.<sup>64</sup>

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63. See I.C.S.I.D., Document I.C.S.I.D./3/Rev.23, List of Contracting States and other Signatories of the Convention, as of January 3, 1978.

64. See ICSID Second Annual Report 1967, List of Contract-States and Other Signatories of the Convention shows the following African States were parties to the Convention: Burundi, Cameroon, Central African Republic, Chad, Congo, (Brazzaville), Dahomey, Ethiopia, Gabon, Ghana, Ivory Coast, Kenya, Liberia, Malagasy Republic, Malawi, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia, Uganda, and Upper Volta.

As an institution for settlement of disputes, ICSID, as required by Article 3 of the Convention, maintains a Panel of Conciliators and a Panel of Arbitrators. Under the same Article the Centre is required to have an Administrative Council and a Secretariat. The African countries are represented in all these organs. But as I show below, not all African States become members of all the organs mentioned, and indeed not all the Contracting States choose to be represented in some organs e.g. the Panels of Conciliation and Arbitration.<sup>65</sup>

Pursuant to Article 13(1) of the Convention, each Contracting State has the right to designate up to four persons to serve on each of the two Panels which are maintained by the Centre. The four persons designated by a Contracting State may, but need not be, its nationals. Pursuant to Article 13(2) the Chairman of the Administrative Council may designate ten persons to each Panel. But the persons so designated to each Panel by the Chairman must each have a different nationality.

It may be mentioned that the Centre in its reports indicates that it has been urging the member States to participate fully in the work of the Panels by actually having representatives in them. As of the period 1967-68, 23 States exercised their right to designate persons

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65. For detailed information on African States representation in the ICSID Organs, see ICSID Annual Reports from the years 1967 to date.



in the two Panels, and a total of 81 persons were designated to the Panel of Conciliators and 85 to the Panel of Arbitrators. At the same time, African States party to the Convention represented in the two Panels were: Central African Republic, Dahomey, Kenya, Mauritania, Morocco, Nigeria, Senegal, Togo, Tunisia, Uganda and Upper Volta.<sup>66</sup>

Out of the 73 Contracting States that are members of the Centre and parties to the Convention, African States represented in the Panels by July 1, 1977 were: Benin, Central African Empire (formerly Central African Republic), Gabon, Ghana, Guinea, Kenya, Lesotho, Madagascar, Mauritania, Mauritius, Morocco, Nigeria, Senegal, Togo, Tunisia, Uganda and Upper Volta.<sup>67</sup> As of July 1, 1977, the Panel of Conciliators contained 146 names, and the Panel of Arbitrators 146 names. Thus we see an increase in the number of persons appointed to the Panels.

Since the ICSID maintains the two juridical organs which actually decide on individual cases presented to the Centre, conciliation and arbitration proceedings are handled by these two organs respectively.

In the case of a request for conciliation, any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings may address a request to that effect in writing to the Secretary-General of the Centre. The Secretary-General

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66. See ICSID, Second Annual Report 1967/68.

67. See ICSID, Eleventh Annual Report 1976/77.

is responsible for sending a copy of the request to the other party in dispute. The request must contain information concerning all issues in the dispute, the identity of the parties and their consent to conciliation. If and when the Secretary-General finds that the dispute falls under the jurisdiction of the Centre, he shall register the request and accordingly notify the parties of the registration or refusal. Articles 28-35 of the Convention deal with the question of the proceedings presented to the Centre for Conciliation.

The Conciliation Commission is given the responsibility to clarify all issues in the dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end the Commission may recommend terms of settlement of a dispute to the parties.

In the event of the parties reaching an agreement, the Commission draws up a report on the agreement. In the case of one of the parties to the dispute failing to appear or participate in the proceedings, the Commission also draws up a report noting the party's failure to appear or participate. The proceedings shall be closed by the Commission on the grounds of the said failure by one of the parties. An agreement between the parties ends the dispute and such agreement is recorded in the Commission's report.

A request for Arbitration is made in the same way as that for Conciliation. Articles 36-55 of the Convention all deal with the question of Arbitration. As



soon as possible, after registration of the request by the Secretary-General, the Arbitral Tribunal is constituted. The parties agree on the composition of the Tribunal. Where they fail to do so, the Tribunal shall consist of three Arbitrators, one Arbitrator having been appointed by each party and the third, who shall be the President of the Tribunal, on agreement by the parties (Article 37 of the Convention).

The Tribunal which has the competence to decide whether a dispute can be brought within the jurisdiction of the Centre, or whether for any other reason a dispute is not within its competence, decides any dispute in accordance with the rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal may apply the law of a Contracting State party to the dispute (including its rules on Private International Law) and such other rules of international law as may be applicable (Convention Articles 41-42).

It is important to note that the decision (award) of the Tribunal, though reached by a majority of the votes on every question submitted, may have an individual opinion attached to it by any member of the Tribunal whether he dissents from the majority or not, and that the award itself is binding on the parties. The award is not subject to appeal or to any other remedy except those provided for in the Convention. It is equally important to mention that pursuant to Articles 50, 51 and 52 an "award" of the Tribunal, at the request of one of the parties, may be subject to interpretation, revision or annulment by the Tribunal, under certain circumstances.

After having dealt with the questions concerning the jurisdiction of the Centre, its conciliation and arbitration, with a view to establishing a link between those named functions of the Centre and application of the Convention to or by African States, consideration should be given to settlement (if any) of disputes involving African States and foreign investors,<sup>68</sup> who are nationals of other States parties to the Convention. Thus here my concern is to study and analyse foreign investment controversies arising out of the relationship between African States and foreign private investors, nationals of other States, party to the Convention.

According to the data available, by the middle of 1975, sixty-six countries had ratified the Convention.<sup>69</sup> By 1978, only eight arbitration cases had been brought before the Centre. Those eight cases appeared on the Register of the Centre as of January 3, 1978. Out of all eight cases, five of them are between some African Contracting States and some private foreign investors, nationals of capital exporting Contracting States. The other three cases all concerned private foreign investors and the Government of Jamaica.

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68. On the rights of foreign nationals, see Permanent Court of International Justice (PCIJ) 1923, Series B. No. 4 (I.W.C.R. 145), "Nationality Decree in Tunisia and Morocco, November 8, 1921"; I.C.J. Reports 1950, "Case concerning rights of nationals of the United States of America in Morocco, Order of November 22, 1950"; I.C.J. Reports 1952, "Case concerning rights of nationals of the United States of America in Morocco, Judgment of 1952", I.C.J. Pleadings, 1952, Morocco Case, (France v. U.S.A.), Vol. II, "Case concerning rights of nationals of the United States of America in Morocco".

69. See Fawcett, International Economic Conflict, p.69, loc. cit.; Ibid., Appendix II. According to Article 68(2) ....



The disposition status of the 5 investment disputes involving African States as of January 3, 1978 was as follows:

<u>Registered</u>	<u>Parties</u>	<u>Disposition</u>
December 27, 1971	Holiday Inns/Occidental Petroleum vs. Government of Morocco	Proceedings continuing
March 6, 1974	Adriano Gardella Spa vs. Government of Ivory Coast	Award rendered August 29, 1977
October 5, 1976	Government of Gabon vs. Societe Serete S.A.	Proceedings discontinued after amicable settlement
November 4, 1977	AGIP Spa vs. Government of People's Republic of Congo	Tribunal to be constituted
December 15, 1977	Societe Ltd. Benvenuti & Bonfant arl vs. Government of the People's Republic of Congo	Tribunal to be constituted

It is important to mention, before any comments can be passed regarding some of the cases above, that, in general, the majority of private foreign investors doing business with African Governments, prefer to include a provision in the Investment Agreements<sup>70</sup> they conclude with those countries.

Study and analysis of the data concerning the cases that have been brought before the Centre has revealed

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69. Continued ...  
the "Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposits". By 1975 no Latin American States had ratified the Convention.
70. See I.C.S.I.D., For Immediate Release, Corrected Text, January 3, 1978; Idem., Annual Report 1976/1977, Annex 6, loc.cit. above. Data on the table of cases as listed above is found in these given references. For further data and references, see I.C.S.I.D., Investment Laws .....

that the investment controversies which have been tackled so far by the Centre have arisen from private foreign investments in developing countries. It would appear that there are no investment controversies between Contracting States of the developed countries and nationals (private investors) of other Contracting States of the developed world. If such investment disputes do arise between the above-mentioned Contracting States, one wonders where they are resolved.

It is not necessary for me to provide the answer to the above question because it is commonly recognised, and indeed it is mentioned in the Preamble of the Convention that "such disputes would usually be subject to national legal processes".<sup>71</sup> Perhaps the majority of the developing States (African States included) have realised that the ICSID might have been created to deal with the investment disputes related to investments in these developing countries, and that is why the Centre has made little progress, as reflected by the small number of cases which have been brought before its jurisdiction. Or perhaps, as records have revealed,

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70. Continued ...

of the World, (prepared by ICSID and dealing on a country-by-country basis with laws and international agreements affecting investments, published by Oceana Publications, Dobbs Ferry, N.Y.).

71. See Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of other States", in Recueil des Cours, 1972, II, Vol.136, (Leiden, 1973), pp.331-410; R.P.Anand, International Courts and Contemporary international law and Politics, (London, 1974); J. Lauterpacht, The Development of International Law by the Permanent Court of International Justice, (London, 1958); M.O. Hudson, World Court Report: A Collection of the Judgments, Orders, Opinions of the Permanent Court of International Justice, (Washington, 1934); H. Waldock, International Disputes: The Legal Aspects, (London, 1972).



the ICSID takes such a long time to reach a solution on a particular dispute, that the Centre has not been frequently utilised by the Contracting States who have instead opted to use their national laws to settle any investment disputes arising from foreign private investments. All that can be said with certainty is that, judging by the number of cases which have been brought before the Centre it is found that the Centre is not a very effective machinery for settlement of economic disputes. To confirm this position one may cite Professor James Fawcett: " .... the contribution of the Centre over a decade to the solution of foreign investment problems cannot be called substantial".<sup>72</sup>

The following salient points are deduced from the above discussions in this sub-section:

1. The disputants may take the dispute to the Centre if they choose to do so. They may also choose the class or classes of disputes they wish to submit.
2. A member State may withdraw its case from the Centre at any time it wishes (see the Jamaica cases).<sup>73</sup>
3. A disputant may attach its opinion to the award of the tribunal.
4. Utilisation of the Centre is time consuming.

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72. See Fawcett, op.cit. p.69

73. For the Jamaica Case, see Register of the ICSID as of January 3, 1978; New York Times, June 26, 1974, p.66, col.2 "Jamaica challenged the applicability of the Convention to its territory".

### CONCLUSION

The exercise of economic self-determination by African States, which begins with the attainment of political independence, contributes to the establishment and maintenance of a reasonably stable international economic order. Political independence is a prerequisite for advancement to economic self-determination, but it is not synonymous with the latter. Political independence formally is an act of the metropolitan state; whereas economic self-determination is exercised by a newly independent country within the bounds of the existing principles, norms and substantive obligations.

The exercise of self-determination in the contemporary world requires the modification and development of international norms and principles which are in keeping with the principles recognised and subscribed by the members of the United Nations and the specific means by the developing countries unilaterally or in co-operation with other members of the international community. During the process of effecting the principle of economic self-determination African States formulate positive new laws in conformity with international economic law; new rules which are based on the new international legal norms and U.N. Charter of Economic Rights and Duties of States are being evolved. From the time when most African countries gained their political independence (about two decades ago) to the time when the international community begun to introduce the new international economic order, and adopted the Charter of Economic Rights and Duties of States, African States have influenced



this need for change through the United Nations and through their own practice. The invocation by African States of the principle of sovereignty over natural resources has played an essential role in their exercise of economic self-determination.

Substantive developments have highlighted the recognised norms of international economic law relating to the right over natural resources, foreign investment operations, and the utilisation of international river basins. Some of these salient principles concern: granting of investment rights, control of expatriation of capital profits and gains, right to compensation for nationalised property, the principles of "community of coriparian States in the water of an international river", and "equitable utilisation of the water of an international drainage basin".

In order to exercise economic sovereignty, African States use various legal techniques. They formulate, among others, such domestic laws as: the constitution, mining, investment, agricultural and etc. One of the purposes of the economic provisions in those domestic laws is to regulate foreign investments operating in the given African host State. Such provisions also regulate the activities of both national and foreign public corporations and private companies operating in that particular African country.

African States also enter into international economic agreements, for the purposes of utilisation of natural resources, economic uses of African international river

basins, promotion of economic co-operation, resolution of territorial controversies, and settlement of international disputes.

The African States have sought to establish and strengthen development and co-operation amongst themselves especially at sub-regional level.

In the exercise of economic sovereignty by African States, inter alia, the following principles of international law have been invoked: sovereign equality of States; permanent state sovereignty over wealth and natural resources; international co-operation for economic development; natural and equitable benefit; fulfilment in good faith of all international obligations; non-interference into internal affairs of other states; respect for the sovereignty and territorial integrity of States, peoples and nations; and pacific settlement of international economic disputes.



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